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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 463.

HECTOR McDONALD AND MARGARET McDONALD,
PLAINTIFFS IN ERROR,

vs.

THE OREGON RAILROAD AND NAVIGATION COMPANY,
INCORPORATED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED FEBRUARY 19, 1913.

(23,554)

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1 & 2 *Transcript.*

In the Supreme Court of the State of Oregon.

THE OREGON RAILROAD AND NAVIGATION COMPANY, Appellant,

vs.

HECTOR MCDONALD and MARGARET MCDONALD, Respondents.

Appeal from the Circuit Court of Wallowa County.

Hon. J. W. Knowles, Judge.

W. W. Cotton, Arthur C. Spencer, and T. H. Crawford, Attorneys for Appellant.
Turner Oliver, Attorney for Respondents.

Filed: Pendleton, Apr. 26, 1910. J. C. Moreland, Clerk Supreme Court, (Signed) By Lee Morehouse, Deputy.

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4 Be It Remembered, that heretofore on the 31st day of August A. D. 1908, there was filed in the office of the Clerk of the Circuit Court a Complaint in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon for Wallowa County.

THE OREGON RAILROAD & NAVIGATION COMPANY, Plaintiff,
vs.
HECTOR MCDONALD and MARGARET MCDONALD, Defendants.

Complaint.

Plaintiff for cause of suit against the defendants above named alleges:

I.

That plaintiff is now and *and* has been at all times herein stated a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and has charter power and authority to construct or acquire, equip, operate and maintain a line of railroad and telegraph from Elgin in Union County, Oregon, to Joseph in Wallowa County, Oregon, and to carry freight and passengers thereon and to transmit messages thereover and to collect and receive tolls therefor as a common carrier for hire; and that it has paid its annual license fee to the State of Oregon for the year ending June 30, 1909.

II.

That the defendants herein mentioned were and are at all times herein stated, husband and wife; and that on or about the 18th day of September, 1905, plaintiff by a deed then and there duly executed, under seal and acknowledged by the defendants above named, acquired from said defendants the following described real estate situate in Wallowa County, Oregon, to-wit:

"A strip of land 100 feet in width, being 50 feet in width on each side of and parallel with, the center line of the main track of The Oregon Railroad & Navigation Company's Railroad, as the same is staked out and located over and across the land of the said Hector McDonald and Margaret McDonald, situate in Wallowa County, State of Oregon, and known and designated as follows: Northeast quarter of Southeast quarter of Section Five (5); Southwest quarter of Southwest quarter and Southwest quarter of South east quarter of Section Four (4); North half of Northeast quarter of Section Nine (9); West half of Northwest quarter and Southeast quarter of Northwest quarter *or* Section Ten (10); all in Township One (1) North, Range Fort*h*-Two (42) East W. M.

And that plaintiff thereupon entered into possession of said right of way and said strip of land described in said deed, which deed was executed in Wallowa County, Oregon, September 18th 1905, and recorded in Book "M" of Deeds at page 162 thereof, and is now in the possession thereof; and that since acquiring said land the said plaintiff corporation has thrown up and constructed upon said strip of land, the grade of its railroad bed, said strip of land with the grade so constructed forming a part of its line of railroad from Elgin in Union County to Joseph in Wallowa County aforesaid. And that the

plaintiff is prosecuting the construction of its said enterprise with all possible diligence and is building said railroad in good faith and with all possible speed, and has laid its track on said railroad from Elgin to within about one mile of the property hereinbefore described, and has employed in laying said track and in building said railroad and at the present time, several hundred men and equipment of the value of many thousands of dollars, including a track laying machine, and is laying from one mile to two miles of track per day.

6

III.

That the defendant Hector McDonald above named, has warned and notified plaintiff and its agents and employés that he will not permit it or them to lay or construct its track over or upon said strip of land, and has threatened to, and will unless restrained by this Court from so doing, enter upon said strip of land repeatedly trespass upon the same and prevent this plaintiff or its agents or employés from building its said track over or upon the same, and will, unless so restrained tear down and remove any construction work done by said plaintiff upon the said land to the irreparable damage of this plaintiff and will prevent plaintiff from completing the construction of the said railroad on through to Joseph.

IV.

That if the plaintiff's said enterprise is thus blocked and held up by the said defendant the completion of its said enterprise and the completion of the said railroad will be indefinitely delayed and that the season within which said construction work can be done for the present year will end late in October or early in November of the present year, and if plaintiff is thus annoyed and harassed it will be unable to complete its railroad to Joseph, and it will suffer great and irreparable damage and loss, its enployés engaged in said work will disband and its said enterprise in which it has already over one million dollars invested will lie dormant and useless for an indefinite period of time, and that the citizens and residents of Wallowa County, who need and are awaiting with great anxiety the completion of the construction of said railroad that they may move their crops the present season, will be denied transportation facilities and great and irreparable damage will be suffered, not only by this plaintiff, but by the entire community into which said railroad is being constructed.

7

V.

That the plaintiff has no plain, speedy or adequate remedy at law, and that the damage about to be done to this plaintiff by said defendants as herein described is irremediable in a court of law.

VI.

That as plaintiff is informed and believes and alleges the fact to be the defendants above named claim some interest in or title to

said premises, but plaintiff alleges that it is the absolute owner in fee simple of said land above described and every part thereof and that defendants' said claim against said premises is without any foundation whatever,

Wherefore, plaintiff prays that pending the hearing of this cause *and* temporary injunction and restraining order be issued inhibiting and enjoining the said defendants or either of them, or any of their agents or employés from trespassing upon or entering upon *of* anywise interfering with plaintiff's said land hereinbefore described, and that upon the hearing of this cause the said injunction be made perpetual, and that said defendants be required to appear and answer concerning the matters herein set forth, and that upon the hearing a decree be entered decreeing that the plaintiff is the owner in fee simple of its said land and every part thereof and that the defendants or either of them have no right, title or estate therein and that plaintiff's said title be quieted against said defendants or either of them, or any person or persons claiming any interest in said land by or through them, or either of them.

And also that plaintiff recover its costs and disbursements in this suit and also have such other and further relief as is equitable and just.

W. W. COTTON,
THOS. H. CRAWFORD, AND
ARTHUR C. SPENCER,
Attorneys for Plaintiff.

(Duly Verified.)

Endorsed: Filed Aug. 31, '08. W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

8 And afterwards on the 2" day of September A. D. 1908, there was filed in the office of said clerk a Summons In words and figures as follows, to-wit:

(Title of Court and Cause.)

To Hector McDonald and Margaret McDonald, the above named Defendants:

In the name of the State of Oregon, You are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of the service of this Summons upon you if served within this county, or, if served within any other county of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will apply to the Court for the relief demanded in the complaint, to wit: For an injunction perpetually restraining and inhibiting and enjoining you, your servants, agents and employés from in any — trespassing upon or interfering with the lands of the plaintiff described as "A strip of land 100 feet in width, being 50 feet in width on each side of and

parallel with, the center line of the main track of the Oregon Railroad & Navigation Company's Railroad, as the same is staked out and located over and across the lands of the said Hector McDonald and Margaret McDonald situate in Wallowa County, Oregon, and known and designated as follows: Northeast quarter of Southeast quarter of section Five (5); Southwest quarter of Southwest quarter and Southwest quarter of Southeast quarter of section Four (4); North half of Northeast quarter of section nine (9); West half of Northwest quarter and Southeast quarter of Northwest quarter of section Ten (10); all in Township One (1) North, Range Forty-two (42) East W. M." and for such other and further relief as may seem meet and equitable and for plaintiff's costs and disbursements.

W. W. COTTON,
ARTHUR C. SPENCER &
THOS. H. CRAWFORD,
Attorneys for Plaintiff.

9 To the Sheriff:

Serve copy of complaint and summons upon defendant Hector McDonald and copy of summons only upon defendant Margaret McDonald.

T. H. CRAWFORD,
Attorney for Plaintiff.

STATE OF OREGON,
County of Wallowa, ss:

I hereby certify that I served the within Summons within said county, this 1st day of Sept., 1908, on the within Hector McDonald and Margaret McDonald, by delivering a true copy thereof, prepared and certified to by me as Sheriff, together with a copy of the complaint, prepared and certified to by me to Hector McDonald and Margaret McDonald, in person and personally.

EDGAR MARVIN,
Sheriff of Wallowa County, Oregon.

Endorsed: Filed September 2, 1908. W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

10 And afterwards on the 29th day of August A. D. 1908, the following Order was made, to-wit:

(Title of Court and Cause.)

Upon consideration of the complaint of plaintiff filed herein and of the facts therein alleged, and it appearing therefrom that the rights of the plaintiff as alleged therein are imperiled and threatened to be so embarrassed as to make the issuance of a preliminary injunction necessary, it is therefore, considered, ordered, and adjudged that a writ of injunction issue herein as prayed for in said com-

plaint until the further order of this Court, upon the filing by the plaintiff of a good and sufficient bond in the sum of one thousand (1,000) dollars, conditioned to the effect that the plaintiff will pay all costs and disbursements that may be decreed to the defendants above named or either of them, and such damages, not exceeding the sum of one thousand (1,000) dollars, as the said defendants may sustain by reason of said injunction, if the same be wrongful or without sufficient cause.

Dated this 29th day of August 1908.

J. W. KNOWLES, *Judge.*

Endorsed: Filed September 1", 1908, W. C. Boatman, Clerk.

(Order for Issuance of Writ of Injunction.)

11 And afterwards on the 1st day of September A. D. 1908, there was filed in the office of said clerk a bond in words and figures as follows, to-wit:

(Title of Court and Cause.)

Whereas, The Oregon Railroad & Navigation Company has commenced a suit against the defendants above named, praying among other things that an injunction issue pending the final hearing of this cause, and

Whereas, the Judge of the above entitled Court has made and signed an order directing that an injunction issue as prayed for upon the making and filing of a bond or undertaking conditioned as required by law in the sum of one thousand (1,000) dollars

Now Therefore, The Oregon Railroad & Navigation Company as principal, and the National Surety Company of New York, a corporation authorized to do a general surety business in the State of Oregon, as surety, do hereby undertake and agree that the said The Oregon Railroad & Navigation Company will pay all costs and disbursements that may be awarded or decreed to the defendants above named or either of them, and such damages not exceeding one thousand (1,000) dollars as said defendants or either or both of them may sustain by reason of said injunction if the same be wrongful or without sufficient cause.

In Witness Whereof the said principal and surety have caused these presents to be executed by their respective officers, this 28th day of August, 1908.

[CORPORATE SEAL.] NATIONAL SURETY COMPANY,
By JAS. McI. WOOD.
ROBERT E. CAUDLY,
Its Attorney in Fact.
THE OREGON RAILROAD &
NAVIGATION COMPANY,
By J. P. O'BRIEN,
Vice-President and General Manager.

Endorsed: Filed Sept. 1, 1908. W. C. Boatman, Clerk.

Approved this 29th day of August A. D. 1908.

J. W. KNOWLES,
Circuit Judge.

Bond.

12 And afterwards on the 10th day of Septmeber A. D. 1908, there was filed in the office of said clerk a Demurrer to the complaint as follows:

(Title of Court and Cause.)

Come now the defendants in the above entitled cause, by Ramsey and Oliver, their attorneys, and demur to the plaintiff's complaint filed herein for the reason that said complaint does not state facts sufficient to constitute a cause of suit against the defendants or against either of them.

RAMSEY & OLIVER,
Attorneys for the Defendants.

I hereby certify that I served a copy of the foregoing demurrer upon T. H. Crawford, one of Pl'ff's Attys., on this Sept. 8th 1908, by mailing a duly certified copy to him, at his address at La Grande, Oregon, he being out of town to day, so that I could not make personal service.

TURNER OLIVER,
Of Counsel for Defendants.

(Demurrer.)

Endorsed: Filed September 10", 1908. W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

13 And afterwards on the 13th day of November, A. D. 1908, or the 5th Judicial Day of said term, the following Order overruling demurrer to Complaint was made:

(Title of Court and Cause.)

This cause came on to be heard at this time on the Defendants' demurrer to the plaintiff's complaint, the plaintiff appearing by T. H. Crawford of counsel and the defendant appearing by Ramsey & Oliver of counsel, and by consent of counsel it was considered and ordered by the court that the demurrer be and the same is hereby overruled and denied and the defendants are allowed ten days from this date to prepare and file answer to the plaintiff's complaint.

J. W. KNOWLES,
Circuit Judge.

Order overruling demurrer.

And afterwards on the 21" day of November A. D. 1908, there was filed in the office of said Clerk an Answer to the Complaint as follows:

(Title of Court and Cause.)

Come now the above named defendants and for answer *fo* Plaintiff's complaint filed herein, admit:

1.

That the plaintiff is now and has been at all times stated in plaintiff's complaint, a corporation duly organized and existing under the laws of the State of Oregon, with authority to construct, acquire, equip and maintain a line of Railroad and telegraph from Elgin, in Union County, Oregon, to Joseph, in Wallowa County, Oregon, and to carry freight and passengers thereon and transmit messages thereover and collect and receive tolls therefor as a common carrier
14 for hire; and that it has paid ita annual license fee to the State of Oregon for the year ending June 30th, 1909; and defendants deny all the other allegations of Plaintiff's complaint except as hereinafter admitted or alleged.

2.

For a further and separate answer and defense to plaintiff's complaint, the defendants allege:

That at all the times hereinafter mentioned, these defendants were and are still husband and wife residing in Wallowa County in the State of Oregon and that the defendant Hector McDonald, is and has been the /wner of the following described real estate situated in said Wallowa County, Oregon, to-wit:

Northeast quarter of southeast quarter of Section Five (5); Southwest quarter of Southwest quarter and southwest quarter of southeast quarter of Section Four (4); North half of northeast quarter of Section Nine (9); West half of northwest quarter and southeast quarter of northwest quarter of Section Ten (10); all in Township One (1) North, Range Forty-two (42) East W. M.; and that on or about September 18, 1905, the plaintiff represented to these defendants that it was about to construct a Railroad into Wallowa County, Oregon, and across defendant's lands above described and that said Railroad would be completed within two years from that date and that the defendant, Hector McDonald, would be enabled to sell his hay and other products of his big ranch in the outside markets and would be able to ship the same over the plaintiff's said Railroad, and desired a right of way for its proposed Railroad across the said lands of defendant, and the plaintiff by said representations induced these defendants to make a conditional deed to the plaintiff, conveying a right of way for plaintiff's road across the above described lands on condition that said road would be completed within two years from that date, which conditional deed was in words and figures to-wit:

15 *Right of Way Deed.*

Know all men by these presents, that Hector McDonald and Margaret McDonald his wife of the County of Wallowa in the State of Oregon in consideration of the sum of six hundred dollars, paid by the Oregon Railroad & Navigation Company, a corporation duly organized under the laws of the State of Oregon, having its principal office at the city of Portland in said State, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said The Oregon Railroad & Navigation Company, its successors and assigns, the following described parcel of land, situate in Wallowa County, in the State of Oregon, to-wit:

A strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of The Oregon Railroad & Navigation Company's Railroad, as the same is staked out and located over and across the lands of the said Hector McDonald and Margaret McDonald situate in Wallowa County, State of Oregon, and known and designated as follows:

Northeast quarter of Southeast quarter of Section Five (5); Southwest quarter of Southwest quarter and Southwest quarter of Southeast quarter of Section Four (4); North half of Northeast quarter of Section Nine (9); West half of Northwest quarter and Southeast quarter of Northwest quarter of Section Ten (10); all in Township One (1) North, Range Forty-two (42) East W. M.

This conveyance is made on the condition that the Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof.

Together with all and singular the trees, wood and timber thereon and the stone, gravel and material therein. To have and to hold the said described premises unto the said The Oregon Railroad and Navigation Company, its successors and assigns forever.

In Witness Whereof, we have hereunto set our hands and seals this 18th day of September 1905.

16 HECTOR McDONALD. [SEAL.]
MARGARET McDONALD. [SEAL.]

Executed in presence of

JESSIE HOOD,
P. A. WORTHINGTON.

STATE OF OREGON,
County of Wallowa, ss:

I, P. A. Worthington, a Notary Public, do hereby certify that on this 18th day of September 1905, personally appeared before me, Hector McDonald and Margaret McDonald, who are to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed, sealed and executed

the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 18th day of September A. D. 1905.

[NOTARY SEAL.] P. A. WORTHINGTON,
Notary Public for Oregon.

Recorded September 26", 1905.
J. A. FRENCH, *County Clerk,*
By W. C. BOATMAN, *Deputy.*

Vol "M" page 162.

STATE OF OREGON,
County of Wallowa, ss:

I, J. A. French, County Clerk for Wallowa County, State of Oregon and ex-officio Recorder for said County and State, do hereby certify that the foregoing Transcript of Deed has been by me compared with the original deed and that it is a true and correct copy of said original Deed and of the whole thereof, as the same appears of record in my office and custody.

Witness my Hand and Seal of the said Court this 7th day of December A. D. 1907.

[Seal County Court, Wallowa County, State of Oregon.]

J. A. FRENCH, *County Clerk,*
By W. C. BOATMAN, *Deputy.*

17 3.

That all of the defendants' said lands above described were fenced and in possession of defendants and were being used by them for farming and pasturing stock and that the plaintiff, during the summer of 1907, partially constructed its grades across and over defendants' said lands above described, but in the fall of 1907 the plaintiff wholly abandoned said Railroad work and ceased the construction of its said line of Railroad through the defendants' said lands and that the plaintiff wholly failed to construct its line of Railroad over or through the above described real premises of the defendants within two years from the date of the right of way deed above set out and that by reason of the said failure of the plaintiff to construct its line of Railroad over the above described premises of the defendants within two years from the date of said right of way deed, together with all right to construct or maintain a Railroad over said lands and all other rights and interests conveyed to the plaintiff by said deed; and that the defendants were in the possession of the real premises described in said deed including said strip of land 100 feet wide, from the date of the execution of said deed until the commencement of this suit, when the plaintiff wrongfully took possession of the right of way and constructed its Railroad over and across the same and continues wrongfully to trespass upon defendants' premises and to wrongfully use and occupy the same without

the consent of these defendants and against their will, and that the only rights or interest that the plaintiff has or ever had in any part of the defendants' said real property above described, it obtained by the deed, a copy of which is hereinbefore set forth and that by reason of its failure to construct its Railroad line across said premises described in said deed within two years from the date thereof, the plaintiff forfeited all rights that it obtained by virtue of said deed and that prior to said date of the commencement of this suit, the defendants re-entered upon said strip of land 100 feet wide described in said deed and repossessed themselves thereof by
18 reason of the forfeiture of all rights under said deed by said plaintiff, and that the defendants, after making said re-entry upon said land, as aforesaid, notified the plaintiff of their said re-entry upon said lands and of the fact that they would insist upon the forfeiture of all interests in said lands by the plaintiff by reason of its said failure to construct its line of Railroad over the premises described in said deed within two years from the date thereof and that these defendants now insist and maintain that plaintiff has so forfeited its interests in said premises and that the defendants are the owners in fee of the strip of land 100 feet wide described in said deed.

4.

That the lands so wrongfully appropriated by plaintiff and so wrongfully used and occupied by it as aforesaid, are reasonably worth the sum of $1,000.00 and the plaintiff has not paid the same nor any part thereof and has not offered to pay defendants anything for said lands since its failure to comply with the conditions of the said deed.

Wherefore, Defendants pray for a decree of this Court dissolving the injunction heretofore issued in this cause; that the defendants be decreed to be the owners of said lands and entitled to the possession of the same and that the plaintiff be enjoined and inhibited from using or occupying said right of way and for such other and further relief as shall seem to the Court equitable in the premises.

RAMSEY & OLIVER,
Attorneys for Defendants.

(Duly Verified.)

Endorsed: Filed November 21", 1908, W. C. Boatman, Clerk.

19 And afterwards on the 12th day of May A. D. 1909, there was filed in the office of said clerk a Reply to defendants' answer as follows to-wit:

(Title of Court and Cause.)

Now at this time comes the plaintiff and for Reply to defendants' answer filed herein, admits, denies and alleges as follows:

Admits that defendants are husband and wife, and at the date of the Right of Way Deed set out in said answer defendants were the owners of the lands mentioned and described in the complaint.

Admits that on the 18th day of September 1905, the defendants made, executed and delivered to plaintiff the Right of Way Deed plead and set out in defendants' answer.

Denies each and every other allegation set out and alleged in said answer save and except as hereinafter alleged.

As a further and separate reply to the affirmative matter set out and alleged in said answer plaintiff alleges:

That in the Spring, Summer and Fall of 1907 plaintiff with the knowledge and consent of the defendants, in good faith, took possession of the right of way over and across the said lands of the defendants so deeded and conveyed to it in said deed set out in defendants' answer and proceeded in good faith to build and construct its railroad grade and road bed upon said right of way over and across said lands and had said grade and road bed completed over and across said lands on the 18th day of September, 1907, and thereafter during the fall of 1907, prosecuted the work building its said railroad from Elgin to Joseph diligently and in good faith until the weather that fall render- it impracticable to go on with such construction until the next season, when it temporarily ceased work thereon without any intention of abandoning said enterprise, and thereafter in the spring of 1908 as soon as the weather would permit resumed the work of constructing said railroad from Elgin to Joseph upon said right of way over and across defendants' said lands and in good faith completed the same since which time the said railroad from Elgin to Joseph in Wallowa County, Oregon, over and across said lands has been and is completed and in daily operation by the plaintiff.

That plaintiff paid the defendants the full value of said right of way across their said lands, to wit: the sum of Six Hundred Dollars which was the consideration for said deed the same being expressed therein.

Wherefore plaintiff prays as in its complaint.

W. W. COTTON,
T. H. CRAWFORD, &
ARTHUR C. SPENCER,
Attorneys for Plaintiff.

(Duly Verified.)

Endorsed: Filed May 12", 1909, W. C. Boatman, Clerk.

And afterwards on the 20th day of May A. D. 1909, there was filed in the office of said clerk a Motion for Judgment and Decree as follows:

(Title of Court and Cause.)

Now at this time comes the plaintiff and moves the Court for Judgment and decree upon the pleadings as prayed for in plaintiff's complaint.

W. W. COTTON,
T. H. CRAWFORD, AND
ARTHUR C. SPENCER,
Attorneys for Plaintiff.

Endorsed: Filed May 20th, 1909, W. C. Boatman, Clerk.

Motion for Judgment and Decree.

21 And afterwards on the 14" day of July A. D. 1909, there was filed in the office of said clerk a Motion for Judgment and Decree as follows:

(Title of Court and Cause.)

Comes now the defendants in the above entitled action and move the Court for a judgment and decree upon the pleadings as prayed for in defendants' answer.

____ ____,
____ ____,
Attorneys for Defendants.

Endorsed: Filed July 14", 1909, W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

Motion for Judgment and Decree.

And afterwards on the 19th day of July A. D. 1909, the following Order overruling motions for Judgment and Decree was made:

(Title of Court and Cause.)

Now at this time this cause comes on for decision upon the motion for judgment on the pleadings heretofore filed herein by the plaintiff and defendant and submitted to the Court in term time by agreement of counsel that the same may be decided in vacation with the same force and effect as if decided in term time. The motion having been argued by the respective counsel and the court being now fully advised in the premises, it is by the court ordered, that said motions be and the same hereby are overruled.

Done and dated at La Grande, Ore., this 16th day of July, 1909.

J. W. KNOWLES,
Circuit Judge.

Endorsed: Filed July 19, 1909, W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

Order overruling motions.

22 And afterwards on the 24th day of February A. D. 1910, there was filed in the office of said Clerk, findings of fact and conclusions of law in words and figures as follows:

(Title of Court and Cause.)

Now at this time the above cause comes on for decision upon the merits, testimony having heretofore been taken herein in vaca-

tion, by agreement of counsel for the plaintiff and defendants that said testimony might be taken in vacation, and that the cause might be argued by counsel upon written briefs in vacation, and decided by the Court in vacation with the same force and effect as if said testimony had been taken, said cause argued, and decided during term time, the court being now fully advised in the premises from the evidence adduced at the trial now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1.

That plaintiff is now and all the times mentioned in the complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

2.

That the defendant Hector McDonald and Margaret McDonald at all times mentioned in the complaint were and now are husband and wife.

3.

That all the times mentioned in the complaint the defendant Hector McDonald was the owner of the following real estate, situated in Wallowa County, State of Oregon: The northeast quarter of the southeast quarter of Section five, southwest quarter of the southwest quarter, and southwest quarter of the southeast quarter of Section four, north half of the northeast quarter of Section nine, west half of the northwest quarter, and southeast quarter of
23 the northwest quarter of Section ten, all in Township One north of Range Forty-two E. W. M.

4.

That on the 18th day of September, 1905, the said defendants for and in consideration of the sum of Six Hundred Dollars to them paid by the plaintiff made, executed and delivered to plaintiff a right of way deed across the lands described in Finding of Fact No. three, said right of way deed, omitting the acknowledgment, being in the following words and figures, to-wit:

Know all men by these presents that Hector McDonald and Margaret McDonald, his wife, of the County of Wallowa, in the State of Oregon, in consideration of the sum of Six Hundred Dollars, paid by the Oregon Railroad & Navigation Company, a corporation duly organized under the laws of the State of Oregon, having its principal office at the City of Portland in said state, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said The Oregon Railroad & Navigation Company, its successors and assigns, the following described parcel of

land, situated in Wallowa County in the State of Oregon, to-wit: a strip of land one hundred feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of The Oregon Railroad & Navigation Company's railroad, as the same is staked out and located over and across the lands of said Hector McDonald and Margaret McDonald situate in Wallowa County, State of Oregon, and known and designated as follows; Northeast quarter of the southeast quarter of section Five, Southwest quarter of the southwest quarter and the southwest quarter of the southeast quarter of Section Four, north half of the northeast quarter of Section Nine, west half of the northwest quarter and the southeast quarter of the northwest quarter of Section Ten, all in Township One North of Range 42 East W. M.

This conveyance is made on the condition that The Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof.

Together with all and singular the trees, wood and timber thereon, and the stone gravel and material therein, to have and to hold the said described premises unto the said Oregon Railroad and Navigation Company, its successors and assigns forever.

In Witness Whereof we have hereunto set our hands and seals this 18th day of September 1905.

HECTOR McDONALD. [SEAL.]
MARGARET McDONALD. [SEAL.]

Executed in the presence of—
JESSE HOOD.
P. A. WORTHINGTON.

24

5.

That the clause in said deed "This conveyance is made on the condition that The Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof" was written therein with a pen by P. A. Worthington, Right of Way Agent, of plaintiff.

6.

That the amount of land covered by said Right of Way deed was and is twenty and one half acres.

7.

That the value of said twenty and one half acres of lad*n* was at the time of the execution of said deed, to-wit September 18, 1905, the sum of Seven Hundred Dollars.

8.

That said right of way across the lands of defendant as described in Finding of Fact No. 3, so divided said lands of defendants as to

leave about two hundred acres on the north side of said right of way and about fourteen hundred acres on the south side of said right of way.

9.

That the two hundred acres laying on the north side of the said right of way is rendered five dollars per acre less valuable by reason of the right of way.

10.

That at the time of the execution of the said right of way deed the defendant had a hay barn upon his said lands that was of the reasonable value of Seven Hundred and Fifty Dollars; that the said right of way runs in such close proximity to said barn as to render said barn entirely worthless for the storing of hay therein on account of the great danger from fire.

11.

That within two years from the date of said right of way deed the plaintiff entirely completed the construction of the grade along said right of way over the lands of defendant-.

25 12.

That the plaintiff abandoned the construction of its said road in December, 1907, and did not resume construction of the same until May, 1908, and that the rails were not laid upon said grade across the land of the defendants until August, 1908.

13.

That during the winter of 1907 the defendant Hector McDonald closed up the gaps in the fence caused by *defendant's* grading the right of way, and thereafter used said land as he had been accustomed to use the land before.

14.

That in August, 1908, the defendant Hector McDonald posted a notice at the west end where the said right of way entered his land, and a similar notice, at the east end where said right of way entered his land, notifying the plaintiff not to enter said land.

Conclusions of Law.

1.

That the following clause in the deed, set forth in Finding of Fact No. 4, to-wit: "This conveyance is made on condition that the Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof" was and is a condition subsequent, and not a covenant, and

was so intended by the defendant- at the time they executed said deed.

2.

That in the winter of 1907 the defendants re-entered said strip of land, deeded to the plaintiff, and thereby declared a forfeiture of said conveyance.

3.

That the said defendants have not by word or acts waived said condition in said deed.

26 4.

That plaintiff's suit should be dismissed, and that defendants should have judgment against plaintiff for their costs and disbursements of this suit.

Done and dated at La Grande, Oregon, this 12th day of February, A. D. 1910.

J. W. KNOWLES,
Circuit Judge.

Endorsed: Filed Feb'y 24, 1910. W. C. Boatman, Clerk.

And afterwards on the 24th day of February A. D. 1910, it being the 16th Judicial day of November 1909 term of Court, the following judgment was rendered.

(Title of Court and Cause.)

This cause having been heretofore tried at which trial the plaintiff appeared by W. W. Cotton, A. C. Spencer and T. H. Crawford of counsel, and the defendants appeared by Turner Oliver of counsel, and after hearing the testimony of the witnesses and the argument of counsel, the cause was submitted to this Court on written briefs, and the Court not being fully advised took the same under advisement with decision and decree to be rendered and entered in vacation, with the same force and effect as of term time.

And the Court being now fully advised in the premises both as to fact and law, has made its findings of fact and conclusions of law and filed the same in this Court, and now, based on said findings of fact, it is considered, adjudged and decreed by the Court, that the grant of right of way made by Hector McDonald and Margaret McDonald on the 18th day of September, 1905, to the above named plaintiff across the lands of the above named defendants described in the plaintiff's complaint, was made upon
27 condition that the above named plaintiff would construct its line of road over and across said premises within two years from that date, and that said plaintiff failed to perform the condition by which said grant was made, and that thereafter and before the commencement of this suit the defendants re-entered upon the

premises granted and repossessed themselves of the same and declared that the plaintiff had forfeited all its rights, and interests in and to said right of way and every part thereof, and when this suit was commenced the defendants were the owners and in possession of all of said premises, and were entitled to the possession of said premises as fully and completely as if no conveyance had ever been made by them, and that said defendants are still the owners of every part of said premises and entitled to the possession thereof.

It is further considered, adjudged and decreed by this Court that the injunction heretofore issued against the above named defendants be dissolved, set aside and held for naught and that this cause be dismissed and that the defendants have and recover *off* and from the plaintiff their costs and disbursements of this suit allowed and taxed at $39.25 and that execution may issue therefor.

Done and dated at Enterprise, in Wallowa County, Oregon, on this February 24th, 1910.

J. W. KNOWLES,
Circuit Judge.

Endorsed: Filed February 24", 1910. W. C. Boatman, Clerk.

28 And afterwards on the 26" day of February A. D. 1910, there was filed in the office of the clerk of said court, a bill of costs in words and figures as follows:

(Title of Court and Cause.)

Clerk's Fees	$5.00
Attorney's Fees	10.00
Depositions Copy of Deed	.75
Witnesses, See below	....
Court Reporter's Fees	5.00
Copy of Testimony	11.50
Witnesses:	
E. D. Weaver, 1 day 6 miles	2.60
Leonard Couch, 1 day 2 miles	2.20
C. W. Mumford, 1 day 2 miles	2.20
Total	$39.25

STATE OF OREGON,
County of Union, ss:

I, Turner Oliver, being first duly sworn, say I am att'y for defendant- in the above entitled cause, and except officers' fees, which are prescribed by statute, that the disbursements set forth above have been necessarily incurred by the Defendants in this suit, who *is* entitled to recover the same from the Plaintiff; that the witnesses above named were each necessary and material in the trial of this cause; that they each actually traveled the number of miles and

attended the number of days set opposite their respective names, at the request of the Defendants herein, as witnesses only in said cause.

TURNER OLIVER.

Subscribed and sworn to before me this 23rd day of February A. D. 1910.

[SEAL.] ED WRIGHT,
County Clerk.

I hereby acknowledge having received a correct copy of the foregoing Cost Bill and I accept service of the same this Feb'y 24 1910.

____ ____,
Of Counsel for Plaintiff.

I hereby certify that I served the within Cost Bill on T. H. Crawford on this Feb'y 24, 1910, by leaving a duly certified copy at his office in La Grande, Oregon, he not being in his office at the time.

TURNER OLIVER.

Endorsed: Filed Feb. 26, 1910, W. C. Boatman, Clerk, by Chas. G. Bilyeu, Deputy.

29 And afterwards on the 9th day of April A. D. 1910, the Plaintiff filed its Notice of Appeal in words and figures as follows, to-wit:

(Title of Court and Cause.)

To Hector McDonald and Margaret McDonald, defendants in the above entitled suit, and to Turner Oliver, their attorney:

You, and each of you, will take notice that the plaintiff appeals to the Supreme Court of the State of Oregon from the judgment and decree entered in the above entitled suit, by the Circuit Court of the State of Oregon for Wallowa County, on the 24th day of February A. D. 1910, in favor of the defendants and against the plaintiff, to the following effect:

And the Court being now fully advised in the premises, both as to fact and law, has made its findings of fact and conclusions of law and filed the same in this Court, and now, based upon said findings of fact, it is considered, adjudged and decreed by the Court, that the grant of right of way made by Hector McDonald and Margaret McDonald on the 18th day of September, 1905, to the above named plaintiff across the lands of the above named defendants, described in the Plaintiff's complaint, was made upon condition that the above named plaintiff would construct its line of road over and across said premises within two years from that date, and that said plaintiff failed to perform the condition by which said grant was made, and that thereafter and before the commencement

of this suit the defendants re-entered upon the premises granted and re-possessed themselves of the same and declared that the Plaintiff had forfeited all its rights, and interest in and to said right of way and every part thereof, and when this suit was commenced the defendants were the owners and in possession of all of said premises and were entitled to the possession of said premises as fully and completely as if no conveyance had ever been made by them, and that said defendants are still the owners of every part of said
30 premises and entitled to the possession thereof.

It is further considered, adjudged and decreed by this Court that the injunction heretofore issued against the above named defendants be dissolved, set aside and held for naught and this cause be dismissed and that the defendant- have and recover *off* and from the plaintiff their costs and disbursements of this suit allowed and taxed at $39.25 and that execution may issue therefor.

And you, and each of you, will further take notice that plaintiff appeals from the whole and every part of said judgment and decree.

W. W. COTTON,
ARTHUR C. SPENCER, &
T. H. CRAWFORD,
Attorney- for Plaintiff.

I hereby accept service *on* the foregoing notice of appeal and acknowledge receipt of a copy thereof at La Grande, Oregon, this 7th day of April, 1910.

TURNER OLIVER,
Att'y for Defendants.

Endorsed: Filed April 9", 1910, W. C. Boatman, Clerk.

And afterwards on the 9th day of April, A. D. 1(1(), the Plaintiff filed its Undertaking on Appeal in words and figures as follows:

(Title of Court and Cause.)

Whereas, the plaintiff in the above entitled cause, has appealed to the Supreme Court of the State of Oregon from the judgment and decree entered in the Circuit Court of the State of Oregon for Wallowa County, in the above entitled cause, on the 24th day of February A. D. 1910, in favor of the defendant- and against the plaintiff.

Therefore, we, the Oregon Railroad and Navigation Company, and J. Van Buren, surety, do hereby undertake that Plaintiff
31 will well and truely pay all damages, costs and disbursements which may be awarded against it on said appeal.

OREGON RAILROAD & NAVIGATION CO., *Plaintiff,*
Per C. J. VAN BUREN, *Surety.*

STATE OF OREGON,
County of Union, ss:

I, J. Van Buren, being first duly sworn, say that I am surety in the foregoing undertaking on appeal; that I am a resident householder within the State of Oregon and that I am worth the sum of $250.00 over and above all debts and liabilities exempt from execution.

J. VAN BUREN.

Subscribed and sworn to before me this 7th day of April 1910.

[SEAL.] M. ETHEL GULLING,
Notary Public for Oregon.

I hereby accept service *on* the within undertaking on appeal & acknowledge receipt of a copy thereof this 7th day of April, 1910, at La Grande, Oregon.

TURNER OLIVER,
Att'y for Defendants.

Endorsed: Filed April 9, 1910, W. C. Boatman, Clerk.

32 *Certif-cate.*

STATE OF OREGON,
County of Wallowa, ss:

I, W. C. Boatman, County Clerk of Wallowa County, State of Oregon, and ex-officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing copies of pleadings, papers, orders, journal entries, and judgment entry, constituting the judgment roll, together with the Notice of Appeal and Proof of Service thereof, and Undertaking on Appeal, in the case Oregon Railroad & Navigation Company, Plaintiff and Appellant, vs. Hector McDonald and Margaret McDonald, Defendants and Respondents, have been by me compared with the originals thereof, and that they are true and correct copies of all the original pleadings, papers, orders, journal entires, judgment entry, Notice of Appeal and Proof of Service thereof and Undertaking on Appeal, as the same appears of record and on file in my office and custody.

Witness my hand and the seal of said Circuit Court, at Enterprise, in said County and State, this the 14th day of April, A. D. 1910.

[SEAL.] W. C. BOATMAN, *Clerk.*

33 In the Circuit Court of the State of Oregon for Wallowa County.

THE OREGON RAILROAD & NAVIGATION COMPANY, Plaintiff,
vs.
HECTOR McDONALD and MARGARET McDONALD, Defendants.

Testimony.

Tried November 3, 1909.

34 *Index.*

Plaintiff's witnesses in chief.	Direct.	Cross.	Redirect.	Recross.
H. A. Brandon	1	10	11	..
Defendant's witnesses in chief.				
Hector McDonald	12	17	19	..
	20	25	26	..
E. D. Weaver	27	31	..	..
Leonard Couch	31	33	..	..
C. W. Mumford	34	35	36	36

Exhibits.

Plaintiff's Exhibit	A,	Copy of deed in the answer	Page	1
"	" AA	Blue print		2
"	" B	Profile		3
"	" C	Copy of notice		7
"	" D	Itemized statement of expense		9

35 In the Circuit Court of the State of Oregon for Wallowa County.

THE OREGON RAILROAD AND NAVIGATION COMPANY, Plaintiff,
vs.
HECTOR McDONALD and MARGARET McDONALD, Defendants.

This cause came on for trial before the Court, the Honorable J. W. Knowles, presiding, on Wednesday, November 3, 1909, at the Town of Wallowa, Wallowa County, Oregon, by consent of counsel, the plaintiff appearing by Messrs. W. W. Cotton, T. H. Crawford and Arthur C. Spencer, of counsel, and the defendants appearing by Mr. Turner Oliver, of counsel, and the defendant Hector McDonald in person, when the following proceedings were had, to-wit:

It is stipulated by and between the respective counsel that the copy of deed set out in the answer, may be considered as the deed in question and as an exhibit in this case.

H. A. BRANDON, called as a witness on the part of the plaintiff being first duly sworn, testified as follows:

Direct examination by Mr. CRAWFORD:

Q. What official position, if any, do you occupy with the Oregon Railroad and Navigation Company?

A. I am Assistant Engineer.

Q. How long have you sustained that relation with the Company?

A. For the past three years. Well, I might say one year I was representing the contractors working for the company,—Erickson and Peterson. I came here to look after their interests.

36 Q. Were you connected in your official capacity with the construction of the Elgin extension of the Oregon Railroad and Navigation Company, to Joseph?

A. I was engineer in charge of the construction.

Q. When did you first enter upon that duty?

A. I came out in December, 1907, to estimate what it would cost to complete the road, and to make final estimation of what had been done by the contractors.

Q. You were over the road at that time?

A. Yes, I went over every foot of it from River Junction to Joseph.

Q. Are you familiar with the McDonald place and the right of way across it?

A. Yes.

Q. Have you a map or tracing that shows the extent of the road across it?

A. Yes. (Producing blue prints.) There is two of them there. They are duplicates.

Q. Do you know that this map is correct?

A. Yes, to the best of my knowledge and belief it is correct.

Q. What represents the McDonald land,—the right of way across the McDonald land if you know?

A. All that is shown here in red.

Q. About how many feet there does that include?

A. About 8930 feet.

Q. Now when you came in December 1907, did you examine and estimate the amount of work that was done across the McDonald premises?

A. I estimated the entire line from the Grande Ronde River and Wallowa River junction to Joseph,—walked over every foot of it.

Q. What was the extent of the completion of the grade across the McDonald premises at that time?

37 A. The grade was complete. The grade of the road was complete.

The COURT: What time was this.

Q. Have you a profile,—have you the original profile?

A. Yes.

Q. Have you made copies from that original profile?

A. Yes, I have had made copies. I didn't make them myself.

Q. You have had them compared?

A. Yes, I have. They were compared in the office and I have the original with me. This is the original. (Witness compares copy with original.) This is a copy. This is what we call the office file, with a report every *money*, and shows the grading and surface cutting and filling done for that certain month.

Mr. CRAWFORD: We offer this in evidence to be marked plaintiff's exhibit B (No objection).

Q. Now Mr. Brandon, will you just explain to the court here the profile, and where it represents the McDonald lands?

A. It commences here,—at that point it crosses the fence, across this line right at station 81, '2 or '3, and crosses right there as 83. Now every thing above that red line indicates cuts, and everything below is fills. This is a progress report. Every month the work that is done is reported and sent in for filing purposes. Now in 1907 the work done in March would be indicated by Van Dyke brown; here it is indicated in Van Dyke Brown, and here is the date it was done; in April Cobalt blue, which shows here; In May Carmine; in June Prussian blue; in July yellow; in August green, and in September yellow ochre; that is, September, 1907. So the whole of McDonald's work was completed in September, 1907. The work across this property was completed so far as the grade was concerned. The grade was complete.

38 Q. You can't give the date in September, when it was completed, can you?

A. The latest date shown here,—March, May, September 19th, September,—It was all completed on the Hector McDonald property before September. No work done on his after July.

Q. After September 14th?

A. That was not his work. September 14 is back of his line here. The latest color shown on his property is July, Judge. Here is work done in July in yellow. Here is his property here, right across this; that was done in July. Here is where his property crosses here, referring to profile. The last grading done on his land was done in July, 1907. The work in September yellow ochre, is off his property.

Q. Do you know the reason why the work was discontinued in the building of the railway into Wallowa County in the fall and winter of 1907?

A. Objected to by the counsel for the defendants as immaterial.

Mr. CRAWFORD: This testimony might more properly come in rebuttal, but I want to take all the testimony now, in order that this witness can get away on the morning train.

The COURT: The objection is overruled. It may go in the record.

To which ruling of the Court counsel for the defendants excepted and his exception was duly allowed by the Court.

A. Well, about October, 20, 1907, the engineering force of the Harriman lines were ordered to abandon all work they were doing,—

not only on the Elgin extension, but the Umatilla extension, of which I had charge, and the tunnels near Hilgard,—water tunnels; the construction of the Walla Walla depot, and the line improvements we were making, and the discontinuance of the Lewiston-Riparia line,—the Oswego Cutoff,—in fact everything that
39 was being constructed was ordered discontinued, owing to the scarsity of money, and engineers who had worked for the company for years were layed off.

Q. Now did the company afterwards take up the matter of completing the road through,—extending the road through or extending the laying of track on this particular line of railway during the winter of 1907 and '8?

A. As soon as matters quieted down somewhat, and as you gentlemen are well aware, there was quite a flurry in the money market at that time,—I was ordered out here in the early part of December, 1907, in the early part of December, 1907, to make final estimates of the work done by the contractors, and also to estimate what it would cost to complete the road. At the same time the General Manager, who was very anxious to get service to the people of Wallowa County, came out accompanied by the Chief Engineer, and the Division engineer and I met them, and went over the work with them from the temporary crossing of the Grande Ronde River and Wallowa River,—what we call the River Junction all the way to the canyon house, they were with me. Mr. McCulley, one of your representative citizens was with us, and the General Manager was anxious to get the road in, and the Chief Engineer and myself told him it was impractical; we had only a temporary bridge across the Grande Ronde River, which went out, and there was snow on the ground and places had caved in, and even if we had been able to lay track, we could not maintain it during the winter.

Q. Now what occurred at the river Junction in regard to the temporary bridge there that winter?

A. That was washed out with the first freshet.

Q. Now when did you commence active construction work again and laying of track?

40 A. We commenced assembling our forces in May, 1908, as soon as the weather permitted, May or early in June. I haven't got my diary with me.

Q. What is the distance from the River Junction, where the track was laid, up to the McDonald place about?

A. (To Mr. McDonald) The Grande Ronde River is 37 and your place 57—twenty miles. The track was just layed about a thousand feet this side of the Grande Ronde River out across the river.

Q. Now at what time in the season of 1908 did you approach the McDonald place laying track?

A. About the 20th of August, I should say,—between the 16th and 20th of August, we were getting towards his property. I could not state definitely what date.

Q. Well at or about that time what did you find the conditions at the McDonald place as to any obstructions across the track or otherwise?

A. Well, I was sent work by one of the foreman who were preparing the surface for the ties to go on, that there was a notice posted; so I went up there and read this notice and took a copy of it.

Q. Where was the notice posted?

A. It was posted on the west of Mr. McDonald's property,—that is, we call everything going towards Portland west and everything from it, east.

Q. Well, what obstruction if any was there across there?

A. There was just a very light rail put across,—very light fence and the notice posted on the board there,—at the west end and also at the east end.

Q. Both ends?

A. Yes.

Q. Did you take a copy of that notice?

A. I took a copy of the original notice. I didn't take the
41 notice down.

Q. You left the notice there?

—. ——.

A. You have a copy of it?

A. Yes.

Q. Have you the copy there?

A. Yes, I have a copy here. It is a copy enclosed in a telegram to the chief engineer. This is a telegram requesting the exact language. I took it myself. I didn't trust to any clerk so I know it is exact. At the bottom, "No threats made" that was not in the notice.

Mr. CRAWFORD: We offer this in evidence as Plaintiff's Exhibit C. (No objection).

Q. Now what did you do, Mr. Brandon, with reference to the the matter?

A. Well, I drove up and met Mr. Hector McDonald working in his fields. I was rather surprised to find him at work, but I found him there. I asked him if he posted the notice and what the intent of it was. He said he considered our rights had ceased by limitation there; and I asked him what he required of us. He said he thought we should pay him an amount equivalent to what we paid him before. He didn't think we had any further rights there now; and I told Mr. McDonald, that I was no lawyer and could not decide those things, but my instructions were to build the railroad across there, and asked if he intended to use any force to prevent us, and he said no, he was a peaceable man, and he would leave it entirely in the hands of his attorneys. So I wired the company concerning the matter, and as I believed that he would not draw on my — for taking the fence down, I took the fence down and proceeded with the track laying, and the price of hay went up from six to sixteen dollars a ton.

Q. Now what time did you get the track layed into Wallowa?

A. We got it layed into Wallowa on the 10th of September.

Q. What time did you get the track layed up to Enterprise?

A. We got it in operation the 14th of November, we got
42 it layed there before that.

Q. What time did you get it layed to the town of Joseph?

A. In operation the 21st of November,—a week afterwards.

Q. Now what amount of money did the,—well, I will ask you this question. Was it the intention of the company in ceasing work in the winter of 1907, to abandon the enterprise of building this road?

A. No, sir.

Objected to by counsel for the defendants as immaterial. The objection is sustained by the Court.

Q. Now what amount did the railway company expend in building this railroad, from the time you commenced,—recommenced work in the spring of 1908, up until the time you ran onto this notice up there?

Objected to by counsel for the defendants as immaterial.

Mr. CRAWFORD: This is rebuttal.

The COURT: The objection as to the materiality is overruled.

Q. Or can you *sggregate* the matter in that way?

A. No, sir, I can't.

Q. Well, what amount of money did the company expend in the construction of this branch road into the Wallowa, up to the first of October, 1907?

A. $991,244.54.

Q. How much did they expend thereafter,——

Mr. OLIVER: We move to strike out the answer as immaterial, and ask that our objection go to these further questions.

The motion is denied by the Court.

Q. What amount of money did they thereafter expend in completing the road?

43 Mr. OLIVER: We would like to have the record show that we objected to that as immaterial.

The objection is overruled by the Court.

A. $770,513.36.

Q. And what was the distance from the River Junction to the end of the road?

A. 47 miles—46.8 miles.

(Mr. OLIVER:)

Q. I would like to ask if this estimate of expenses was not from Elgin through?

A. As I replied, I gave the total cost of the road here up to the time that work was temporarily stopped, and then the second figures I gave makes the entire cost of the road from Elgin to Joseph.

(Mr. CRAWFORD:)

Q. You have an itemized statement of those matters?

A. Yes, they are all itemized there and signed by the auditor.

Mr. CRAWFORD: We offer the itemized statements in evidence, as Plaintiff's Exhibit D.

Mr. OLIVER: We object to the offer as immaterial.

The Objection is overruled by the court. To which ruling of the Court counsel for the defendants excepted and his exception was duly allowed by the Court.

Mr. CRAWFORD: I believe that is all.

(By the COURT:)

Q. When did you get to Wallowa with the road?

A. September 10th, 1908; completed and in operation to Joseph November 21, 1908.

44 Cross-examination by Mr. OLIVER:

Q. Mr. Brandon, when you stated that the grading was completed across the McDonald place before the first of September, 1907, do you mean to say that the grade was completed and the culverts and bridges built?

A. Yes, the culverts and bridges were all constructed, with the exception of the surface drainage on top,—that is, what we call track drainage.

Q. And there were no ties or rails?

A. No ties or rails,—no.

Q. In laying the ties and putting on the rails you put in additional earth around the ties to hold them,—what is commonly called ballast?

A. We haul in material to hold the ties.

Q. When was that done?

A. That was done in 1908, August and September; just after the track was la*y*ed as soon as we could get at it.

Q. And when was the road completed across this land in question?

A. You mean actually finished the road or the time we were in operation on it?

Q. The time you had actually completed the road across this land?

A. It was not finished complete until in the spring of the year 1909.

Q. Well, when was it completed to the extent of operating trains across it?

A. Between the 15th and 20th of September.

Q. What year?

A. 1908.

Q. You may state whether there was -ny very heavy work done in grading the line across these premises?

A. Yes, there was a couple of big fills,—ten or twelve foot fills.

Q. Was there any rock work?

45 A. There was some little gravel,—no solid rock.

Q. It was all comparative- level valley land?

A. It was valley land, but not particularly level. That is where the steepest grade occurred, so you can see it is not level.

Q. I mean by valley land, land that was not mountainous, and you didn't have hard grading to make?

A. No, sir.

Q. I believe you said you wer-n't on this work prior to December 1908?

A. 1907, sir.

Q. 1907?

A. Not as a representative of the O. R. & N. Company. I came out here to examine the work to advise the contractors how to bid on it, originally in 1906.

Q. This work represented on this profile plat was all done then prior to the time you came here?

A. Yes.

Q. And all you know about it is that this is a record in the O. R. & N. Company's office?

A. Yes, and I further know that in December, when I came here,—there has been no work done since the work was closed down, and I found it in that condition, because I estimated the cost of what was done, and there was nothing further to do.

Mr. OLIVER: That's all.

Redirect examination by Mr. CRAWFORD:

Q. You know of the matter by personal inspection of the road bed as an engineer in 1907 in December, that this work was done and the grade built across these premises at that time?

A. The grade was completed and the contractors received the final estimates on it and were paid in full for the grading.

Plaintiff rests.

46 HECTOR MCDONALD, one of the defendants, called as a witness in their behalf, being first duly sworn, testified as follows:

Direct examination by Mr. OLIVER:

Q. You are the defendant in this case?

A. Yes.

Q. Do you remember the circumstances of your making a deed for the right of way to the O. R. & N. Company on or about the 18th day of September, 1905?

A. Yes, I do.

Q. (Witness is here handed the original deed, a certified copy of which is already in testimony. Is that the deed, you now have in your hands, the original deed executed by you and your wife to the O. R. & N. Company?

A. It is.

Q. You will notice in that deed there is this forfeiture clause;—this conditional clause,—"This conveyance is made on the condi-

tion that The Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof." Why was that clause placed in the deed?

Objected to by the counsel for the plaintiff as not the best evidence. This objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and their exception was duly allowed by the Court.

A. Go ahead and state your agreement?

Mr. CRAWFORD: We object to his stating any agreement, because the deed is all the agreement.

The COURT: This objection is sustained.

Q. Answer the question?

A. The reason I had this condition put in, I didn't care to
47 have them own a strip of land across my field, and start to work and have it a number of years and be in my way and not operate any road. I was wishing the road there to get the benefit from it and didn't care to give a conveyance for the land unless they would get the road on there within a certain time.

Q. Do you know about how many acres of your land is taken by this right of way?

A. It is a little above twenty. I haven't figured it just to know the exact amount,—something like twenty.

Q. In what shape would this right of way leave your land,—your other land, as to being cut off or otherwise, from your main fields?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and his exception was duly allowed by the court.

A. Well, at either end of my place it cuts off a strip of just about twelve acres,—at either end of the field. This leaves it in a V shape,—V shaped corners, and not only that it leaves another corner on the south side of their right of way of nearly four acres between the county road and their right of way; and then on the north side again it leaves about close to two hundred acres with three corners, cut in a V shape.

Q. The shape that it leaves this land in,—these V shaped tracts, now what effect would that have upon your farming these tracts?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is overruled by the Court. To which ruling of the court counsel for the plaintiff excepted and their exception was duly allowed by the Court.

48 A. Well, it leaves it very unhandy for me in crossing the right of way, with both stock and hauling hay or any farm implements. I have asked for open crossings——

Q. I didn't ask for that. You may state about how many acres outside of the right of way is rendered useless for practical purposes, to you,—or comparatively useless?

Objected to by the counsel for the plaintiff as incompetent, irrelevent and immaterial. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and their exception was duly allowed by the court.

A. I will state that there is about fifty acres that is of very poor use to me the way it lays now.

Q. Do you know the reasonable value per acre of the land occupied by the right of way?

Counsel for the plaintiff make the same objection.

The COURT: The objection is sustained unless you confine it to the time the deed was executed.

Q. Do you know what was the reasonable value of the land at the time that this deed was executed?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is sustained by the court.

Q. Well, the reasonable market value, I mean?

Counsel for the plaintiff makes the same objection. The objection is overruled by the Court. To which ruling of the court counsel for the plaintiff excepted and their exception was duly allowed by the court.

A. I would put the valuation at sixty-five dollars an acre.

Q. Was there any agreement or understanding between you and the O. R. & N. Company, about the time that this deed was made that you would have shipping facilities on your own land?

Objected to by the counsel for the plaintiff as incompetent,
49 irrelevent and immaterial. The witness is permitted to answer the question. To which ruling of the court counsel for the plaintiff excepted and their exception was duly allowed by the Court.

Q. (Question repeated).

A. I remember of asking Mr. Worthington about that and he told me that could be arranged with the company; he said such matters could be arranged with the company.

Q. Of what advantage did you regard the agreement to have the road completed within two years to you?

Objected to by the counsel for the plaintiff as incompetent, irrelevent and immaterial. The objection is overruled by the court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed.

A. Well, I considered that the road was a benefit to me as well as anyone else, and I kind of placed myself to do some shipping, and also bought some hay and had it baled, and was compelled to sell the hay without shipping and with a small loss to me.

Q. You may state whether or not at the time you made this deed to the O. R. & N. Company, you had any application from any other source for a right of way across your land?

Objected to by the counsel for the plaintiff as immaterial.

The COURT: What do you claim for that, Mr. Oliver.

Mr. OLIVER: We claim that there was another company urging him to sell them a right of way, and that he de-lt with the O. R. & N. Company, because he thought the O. R. & N. Company would be more of an advantage in having a system that would carry freights all over the state, and the main reason he insisted on having this conditional clause in that deed, was that the O. R. & N. Company had been talking of building a good many years, and he thought possibly they would not build if they could get this man Cook out of the way, and had the conditional clause, put in the deed for the protection of himself in that regard also.

The objection is sustained by the Court. To which ruling of the court counsel for the defendants excepted and their exception was duly allowed by the Court. Counsel for the defendants asks for the answer to be placed in the record over the objection.

A. (Excluded.) There was a man here by the name of Cook, who was seeing about right of way, and he also offered to buy, and I was asked if I could sell him this same right of way, and I told him I would consider the matter and let him know later.

Q. Go ahead and tell what was done?

A. During that same time Mr. Worthington called on me more than once,—that is once or twice, and I also,—I sold the right of way to Mr. Worthington,—that is, with this agreement.

Q. You may state whether or not it was your intention to pass title to the O. R. & N. Company, if they failed to build the road within two years so you would have the advantage of shipping over the line within that time?

Objected to by the counsel for the plaintiff as incompetent, irrelevent and immaterial, and the deed itself is the best evidence of the intention of the parties to it. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and their exception was duly allowed.

A. It was not my intention to pass title to them if they didn't fulfill their agreement at all.

Mr. OLIVER: I believe that is all for the present.

Cross-examination by Mr. CRAWFORD:

Q. You say that this land was worth in the market at the time you made this deed sixty-five dollars per acre?

A. Yes.

Q. Do you know of any land in that vicinity selling for that price at that time or about that time?

A. I can't mention any that was sold just at that time or in that vicinity.

Q. Isn't it a fact that the construction of the Oregon Railroad & Navigation Company into Wallowa County has greatly enhanced the market value of the land,—real estate like that?

A. Yes, I think so.

Q. Isn't it a fact today that land is not worth in the market sixty-five dollars per acre?

A. No, sir. I don't think so.

Q. Isn't it a fact that most of the land that the road runs over and takes is very poor land?

A. No, sir.

Q. Isn't it a fact that a great deal of it is a gravel bed, that has never been cultivated successfully to any crop?

A. I think their line runs over,—a little bit over half a mile that has never been cultivated at all. And the rest is,—some of it has been cultivated and raised crops on, and the balance is hay land that has been sowed over.

Q. Isn't it a fact that the land on the north of the track is practically all a gravel bed?

A. No, sir.

Q. You know the Sykes place?

A. Yes.

Q. The same quality of land as this?

A. Part of it,—yes.

Q. How much of the same quality,—what proportion of
52 the same quality does the road bed take,—as the Sykes land?

A. Just one forty of Mr. Sykes' land.

Q. How much of the land is like Mr. Sykes' that the road takes?

A. You mean the right of way takes?

Q. Yes?

A. About eight acres.

Q. Isn't it a fact that up as late as 1908, that the Sykes land was not worth in the market to exceed thirty dollars an acre?

A. Would I be allowed to state what he asked for it?

Q. Well, you can explain it any way you want to?

A. I offered to buy the land and made him an offer on the land, and he stated what he would take for the land, and he said he would take seventy dollars an acre for the land.

Q. When was that?

A. That was a year ago.

Q. A year ago?

A. Yes.

Q. Since the road has been put in?

A. Yes. But it wasn't since the road was completed.

Q. You was willing to pay him the market price for the land?

A. Yes.

Q. First?

A. Yes.

Q. What did you offer him?

A. The last offer I made him was what the Railroad Company offered. They offered to take six acres at fifty dollars an acre, and I offered to take the balance of it off his hands. That is what Mr. Sykes told me the railroad company offered him.

Q. That was a gravel bed,—they wanted the gravel in it?

A. I don't know what they wanted it for.

Q. Special privileges. You acted in that deal as agent
53 for the Railroad Company, didn't you, in the purchase of that land, personally for Mr. Brandon?

A. I went to see Mr. Sykes at one time and met him on the road and asked him.

Q. As a favor for Mr. Brandon?

A. Yes.

Q. And didn't you tell Mr. Brandon in this conversation, that that land was not worth in the market to exceed thirty dollars?

A. I don't remember.

Mr. CRAWFORD: That's all.

Redirect examination by Mr. OLIVER:

Q. You may state to the court, how that flat covered by the Sykes land and the land east of it and south of the Sykes land, is, as to being gravel or otherwise, and how it produces under irrigation?

Objected to by the counsel for the plaintiff as immaterial and not redirect examination. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and their exception was duly allowed by the court.

A. The greater portion of that flat is gravel-y, and some of it is not. You can't find any gravel on certain portions of it. The gravel land with irrigation produces well with anything in the way of clover, timothy or grain. I have raised now for two years right along joining the railroad track on gravel land forty-three and forty-five bushels to the acre of barley.

Q. You may also state to the court whether you control,—whether you own water rights and use of waters sufficient to irrigate all your land there?

54 Objected to by the counsel for the plaintiff as incompetent and immaterial and not redirect examination. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and his exception was duly allowed by the court.

A. I do own plenty of water to irrigate what land I own there.

Q. (A few questions in chief.) What portion of this right of way extends across land like that of Sykes, and what portion of it extends across land that is entirely free from gravel?

A. The portion that I had barley on this year, is just about the same condition of land as Sykes' and just beyond west of Sykes' land across a sixty foot road, I raised this year more than three ton of timothy to the acre and also just adjoining that and adjoining this timothy and grain land I had oats that went anyway seventy-five bushels to the acre this year. I consider Mr. Sykes' land with water on it will produce nearly the same as across the county road from it.

Q. That's all.

Recross-examination by Mr. CRAWFORD:

Q. Now I want to ask you, in building the grade across the premises you spoke of your water and water rights on your land. Mr. Brandon, the engineer in charge, constructed culverts that take care of this water, where you suggested to him?

A. Yes, after waiting quite a while.

Q. You got them all the same, anyway. Well, that's all.

(Adjourned until seven o'clock P. M.)

(Met pursuant to adjournment.)

HECTOR MCDONALD, one of the defendants recalled as a witness in their behalf, testified as follows:

Direct examination by Mr. OLIVER:

Q. Now you testified about the railroad cutting off certain
55 corners of your land from your other lands. I would like to have you take this pencil and commence at the west side, marking the first tract, that it would cut off, as No. 1?

Counsel for the plaintiff objects to that as incompetent, irrelevent and immaterial. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

Q. Just mark that in your own figures No. 1. About how many acres actually on the ground is covered by tract No. 1?

A. Just about fifteen acres.

Q. Is that separated entirely from your other lands?

A. Yes.

Q. Now mark the next tract No. 2. Now how many acres in that tract No. 2?

Counsel for the plaintiff makes the same objection to all this testimony. The objection is overruled by the Court.

A. About three acres.

Q. Is that entirely separate from your other lands?

A. Yes,—both with the railroad and the county road.

Q. Now I believe that is a barn on that tract, No. 2?

A. Yes.

Q. Describe that barn and its value or cost?

Objected to by the counsel for the plaintiff as incompetent, irrelevent and immaterial.

The COURT: What is the object of the value of the barn?

Mr. OLIVER: It is rendered useless because the railroad right of way takes one corner of the barn, and it can't be used at all.

The objection is overruled by the Court. To which ruling counsel for the plaintiff excepted and his exception was duly allowed by the Court.

56 A. The barn is a hay barn,—what we call a shed barn. It is not sided on the sides, except eight feet high. The barn is thirty-six by ninety-six feet, with hay truck and all complete. It holds when filled a hundred and sixty ton of hay. I have not used that barn for two years, on account of its being so close to the railroad, I am afraid of fire.

Q. Does that barn extend out on the right of way?

A. One corner does. You asked as to cost too?

Q. Yes.

—. The barn when built about eight years ago cost seven hundred and fifty dollars.

Q. Could it be built for that price now?

A. No, sir.

Counsel for the plaintiff makes the same objection. The objection is sustained by the court.

The COURT: If it has any bearing at all it would be the reasonable market value of the barn at the time the deed was executed.

Q. What was the reasonable value of that barn at the time this deed was executed in September, 1905?

Counsel for the plaintiff makes the same objection.

The COURT: The reasonable market value,—the objection is overruled.

To which ruling of the Court counsel for the plaintiffs excepted and their exception was duly allowed by the court.

A. I would put it at seven hundred and fifty dollars at that time.

Q. Mark this next small corner No. 3? You may state whether tract No. 3 is entirely separated from your other lands?

A. It is,—by the county road and the railroad track.

Q. How much land in tract No. 3?

A. There is three and three fourt-s acres.

Q. Now you may mark this last triangular tract No. 4? How many acres in tract No. 4?

57 A. There is eleven and a fourth. I have had that surveyed.

Q. You may state what representations were made to you on or prior to September 18, 1905, by the plaintiff or its agents, as to the time within which they would have their railroad completed?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is sustained by the Court. To which ruling of the court counsel for the defendants excepted and his exception was duly allowed by the court.

Counsel for the defendants asks for the answer to be placed in the record over the objection.

A. (Excluded.) Their agent, Mr. Worthington, told me the road would be completed and I could ship stuff within two years, and gave it as his opinion that way.

Q. You may state whether or not all of the lands described in

plaintiff's complaint were fenced and enclosed at the time of making that conditional deed and prior thereto?

A. They were all fenced.

Objected to by the counsel for the plaintiff as incompetent, irrelevent and immaterial. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and his exception was duly allowed by the court.

Q. And what were those lands used for?

Counsel for the plaintiff makes the same objection. The objection is overruled by the court. To which ruling of the court counsel for the plaintiff excepted and his exception was duly allowed by the court.

A. Part of it was farmed,—that is, cultivated and farmed and quite a good deal I cut hay on, and the balance was pastured.

Q. Do you know whether the work ceased on the railroad
58 in the fall of 1907, and if so at about what date?

A. The work ceased just about the last day of October, in 1907.

Q. State whether or not this right of way had been fenced off away from your other lands prior to that time?

Objected to by counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. It had not been fenced.

Q. State whether you used the lands during the winter of 1907 and spring of 1908, and if so, how?—including this right of way?

Counsel for the plaintiff makes the same objection. The objection is overruled by the Court.

A. Cattle pastured over the right of way, and also I fed over part of the right of way. In 1907 I cut hay over a small portion of the right of way.

Q. You may state whether or not you notified the O. R. & N. Company, that you had declared a forfeiture on this land, and if so when?

Mr. CRAWFORD: Is that notice in writing.

Mr. OLIVER: We'll see.

Mr. CRAWFORD: If the notice was in writing the best evidence of it is the writing.

A. I don't remember of notifying them, except the notice I put on the right of way, at either side of my place.

Q. You read the notice that was introduced in evidence here this afternoon by the plaintiff, did you?

A. Yes.

Q. State whether or not that is substantially the notice you served at that time?

A. Yes, as near as I remember.
Q. That's all.

59 Cross-examination by Mr. CRAWFORD:

Q. The date of that notice is the correct date on which it was posted,—the 15th day of August, is it?
Q. I think that date is the correct date.
Q. 15th day of August, 1908?
A. Yes.
Q. Now you used this right of way in the same manner in 1906 that you did in 1907, didn't you?
A. I don't remember feeding any stock on it, and I didn't cut any hay on it that I know of in 1906.
Q. Used it for pasture purposes simply did you?
A. Yes.
Q. Well, now in your answers about these several pieces of land that were cut off on the north side of the right of way from your other land, you say they are cut off by the,—some of them cut off by the railroad and wagon road. How many of these pieces are cut off by the wagon road, independent of the railroad?
A. Just one.
Q. Which one is that?
A. This one,—it is No. 3.
Q. No. 3?
A. Yes. No. 2 the wagon road is on the railroad grade, the way it stands now.
Q. In No. 2, if the railroad wasn't there, isn't it a fact that the wagon road would cut it off independent of the railroad, just the way it is?
A. It did cut it off.
Q. It did cut it off before?
A. Yes.
Q. So these two pieces were cut off by the wagon road?
A. No, sir. Just one piece. This piece here the wagon road would not cut off, for it was along this land here. This is
60 the wagon road right here.
Q. The wagon road is on the line?
A. Yes.
Q. The wagon road has been changed to the railroad right of way since?
A. No, sir. Not there.
Q. It runs across there?
A. Yes, by this corner here.
Q. Isn't it a fact that the barn was cut off by the wagon road that passed by the barn?
A. Yes, but not just the shape it is now. The wagon road was over here.
Q. The railroad right of way cuts into the barn lot?
A. Yes.

Q. And the corner of the barn is on the right of way?
A. Yes, on the right of way.

Q. That's all.

Redirect examination by Mr. OLIVER:

Q. Did the wagon road running past the barn in any way interfere with your use of the barn?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. No, sir. I don't consider it did.

Q. That's all.

Witness excused.

61 Mr. E. D. WEAVER, called as a witness on the part of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. OLIVER:

Q. You may state your name and residence, Mr. Weaver?
A. My name is E. D. Weaver,—is my initials; Wallowa is my Post Office address.
Q. Are you acquainted with the lands of Hector McDonald, that are crossed by the O. R. N. Railway?
A. Yes.
Q. Were you acquainted with those lands prior to September 25th, 1905,—September 18th, 1905?
A. Yes, I was.
Q. What was the reasonable market value of the lands that are now taken and covered by the O. R. & N. right of way, on September 18, 1905?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is sustained by the Court, unless he shows he is acquainted with the value of the lands in that vicinity.

Q. Were you acquainted with the value of lands in the vicinity of this right of way across the Hector McDonald lands in the fall of 1905?
A. Well, I think I was to some extent probably,—not as much as some would have been.
Q. How long have you lived in that vicinity?
A. About twelve years,—I think. About that time.
Q. Now you may state what in your opinion was the reasonable market value of these lands now covered by the right of way in September, 1905?

Objected to by the counsel for the plaintiff as incompetent, irrel-

evant and immaterial, and the witness has not qualified himself by showing that he knows anything about the market value of the land.

62 Q. Were you acquainted with the reasonable market value of the lands across which this railroad extends on Hector McDonald in the fall of 1905?

A. I don't know as I understand that question exactly. Wouldn't I have a right to get information on it?

Q. Yes.

A. This land of course of Mr. McDonald's,—why I suppose a man could take land similar to that, is the way I would look at it?

The COURT:

Q. It is supposed to be the market value, is what a man would be willing to sell for in the market who was not compelled to sell, and what a purchaser would be willing to pay who is not compelled to buy?

A. I should put the land at forty-five dollars an acre.

Q. That is, at that time?

A. Yes.

Counsel for the plaintiff moves the court to strike out the answer as incompetent, irrelevant and immaterial.

The motion is allowed by the Court.

Q. Are you acquainted with the reasonable market value of lands in the vicinity of the Hector McDonald land, across which the railroad runs now, in the fall of 1905?

Objected to by the counsel for the plaintiff as incompetent, and immaterial and irrelevant. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. Yes, I think I was.

Q. Are you acquainted also with the reasonable market value of the particular lands across which this right of way extends now, in 1905?

Counsel for the plaintiff makes the same objection. The objection is overruled by the Court. To which ruling of the Court
63 counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. Yes.

Q. What was that reasonable market value?

Counsel for the plaintiff makes the same objection. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. Forty-five dollars an acre.

Q. Are you acquainted with the Hector McDonald premises as they were in the fall of 1905 and the manner in which they are cut by the railroad line?

A. Yes, I am pretty well acquainted with the place all over, I guess.

Q. What effect upon the value of that portion of the land lying north of the railroad track, would the building of this railroad have as it relates to his ranch as a whole?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial, calling for the opinion of the witness. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. I don't know as I quite understand that question?

Q. (Question repeated.) That is, in cutting off a portion of the land lying north of the track from the main ranch, what effect would that have upon the value of the land north of the track?

A. Well, I would consider it would be worth five dollars any way less on the acre, north of the track.

Q. Now are you acquainted with the number of small tracts of land along the railroad, that the railroad has segregated and separated from the other lands, and left them isolated from the other lands of Hector McDonald?

A. Yes, I am acquainted with, I guess, all of them, so far as I know.

64 Q. What effect upon the value of those isolated tracts,—what effect upon the value of this land does the fact that it is isolated from the other lands have?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial, and on the ground that the witness has already answered. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. I answered the question.

Q. (Question repeated.) I refer now only to the isolated tracts?

A. I understand. But in answering the other question I took into consideration the whole thing.

Q. Alright?

A. The small pieces with the rest, understand.

Q. Do you know the barn belonging to Hector McDonald down there next the railroad track?

A. Yes.

Q. State how the building of the railroad affects the use of that barn?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. Well, now in the first place the barn is,—one corner of it is on the right of way, and that would render it, I suppose—he could not use it in that shape. He would have to move it I should think.

Q. Well, what would be,—you may state to the Court whether there would be any danger from fire and sparks from the locomotive passing that barn and setting fire to the hay inside?

Objected to by the counsel for the plaintiff as incompetent, irrelevant and immaterial, and the witness has not shown sufficient knowledge upon that to be an expert to testify in regard to it.

The objection is sustained by the Court.

65 Q. How far from the railroad track is the closest or nearest corner of the barn?

A. Well, I could not answer that question correctly without measuring. I should judge it was something like thirty-five feet,—possibly forty.

Mr. OLIVER: I think that's all.

Cross-examination by Mr. CRAWFORD:

Q. Mr. Weaver, do you know of any land in that vicinity of the same character of this McDonald land in 1905, selling for forty-five dollars an acre?

A. Well, I don't know that I know the name of any just now.

Mr. CRAWFORD: That's all.

LEONARD COUCH, called as a witness on the part of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. OLIVER:

Q. Where do you live, Mr. Couch, and what is your business?

A. In Wallowa, Oregon; real estate.

Q. How long have you been in the real estate business in Wallowa?

A. Five years.

Q. Are you acquainted with the lands belonging to Hector McDonald, covered by the right of way of the O. R. & N. Company?

A. Yes.

Q. Do you know what was the reasonable market value of those lands in the fall of 1905?

A. There was a variety of land,—not all the same.

Q. Well, do you know what was the reasonable market value in that fall,—1905?

A. Yes. I should say from thirty to forty dollars an acre.

Q. What would be the reasonable market value of the twenty and a half acres covered by the right of way?

66 Objected to by counsel for the plaintiff as immaterial. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. I should place the upper end some less than the lower,—about thirty dollars an acre this side of the Sykes place.

Q. I want to know about what would be the reasonable market value of that piece as a whole?
A. Oh, as a whole!
Q. The twenty and a half acres that is covered by the right of way?
A. How many acres separate at this end?
Q. I could not do that.
A. As near as I could tell then, I should say about seven hundred dollars.
Q. Do you know how that right of way cuts the Hector McDonald place?
A. Yes.
Q. What effect would the cutting of the land have upon that portion of the land which lies north of the railroad track?

Counsel for the plaintiff makes the same objection. The objection is overruled by the Court. To which ruling of the Court counsel for the plaintiff excepted and his exception was duly allowed by the Court.

A. There is about how many acres of that?
Q. Supposed to be about two hundred acres?
A. Well, I should judge that it would be about five dollars an acre.

Mr. OLIVER: I believe that is all.

Cross-examination by Mr. CRAWFORD:

Q. Land in that vicinity,—the market value of it in 1905, of that character would be thirty to thirty-five dollars an acre, wouldn't it?
A. Well, I should put, as I said in answering that question, the upper end of that would be a little less probably than thirty-five. and the lower end a little more, because there is a difference in the land.
67 Q. What is land in that vicinity worth now?
A. How is that?
Q. (Question repeated.) On the market?
A. Well, that lower land would be worth at least seventy-five dollars.
Q. What would the upper be worth now?
A. It would be worth about fifty to fifty-five dollars. I could not say just,—I think about fifty.

Q. That's all.

C. W. MUMFORD, called as a witness on the part of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. OLIVER:

Q. Where do you live Mr. Mumford?
A. Wallowa is my post office.
Q. How long have you lived near Wallowa?

A. Since June, 1900.

Q. Were you acquainted with the reasonable market value of lands in the vicinity of Wallowa in the spring of 1905?

A. Yes, somewhat.

Q. Are you acquainted with the lands belonging to Hector McDonald across which the railroad right of way extends?

A. Yes.

Q. Do you know what would be the reasonable market value of the lands occupied by the railroad right of way across the Hector McDonald place in the fall of 1905?

A. Well, I should judge about thirty dollars to thirty-five.

Q. How would the building of the railroad affect the Hector McDonald ranch as to cutting it in two or otherwise?

A. Well, do you mean in price?

Q. No, I want to know how it would affect the land? Would it cut it in two or would it not?

68 A. Well, part of it would be cut in two, and part of it was cut in two by the wagon road.

Q. Do you know what effect the cutting off of some two hundred acres on the north side of the railroad track from the rest of his land would have on its value for use as a ranch?

Counsel for plaintiff "object to the market value being measured by this proposition."

The objection is sustained by the Court. To which ruling of the Court counsel for the defendants excepted and his exception was duly allowed by the Court.

Counsel for the defendants ask for the answer over the objection.

Q. (Question repeated.)

A. (Excluded.) It would have quite a little for me. I don't know just.—I should judge it would damage it at least five dollars an acre any way.

Mr. OLIVER: That's all.

Cross-examination by Mr. CRAWFORD:

Q. What effect did the building of the road have upon the market value of the land in that vicinity?

Objected to by the counsel for the defendants as immaterial and not cross-examination. The objection is overruled by the Court. To which ruling of the Court counsel for the defendants excepted and his exception was duly allowed by the Court.

A. Well, I don't know what effect it would have, or what it has had. I should judge,—that was on the market value, as I understand the question?

Q. Yes, what it would sell for in the market?

A. I should,—it would,—it is not much advanced in price.

Q. How much an acre?

A. Five dollars any way. I think the railroad has advanced it in price that much any way.

69 Q. Isn't it a fact that land in that vicinity prior to the construction of the railroad was worth about thirty dollars an acre?

A. Yes, thirty to thirty-five.

Q. And since that time it has enhanced in value from thirty to seventy-five?

A. No, I could not say that. There is land right there that sold for forty dollars an acre.

Q. Then as a matter of fact, immediately after the railroad was constructed land values increased on the market at least ten dollars an acre, didn't th*at*, down in that vicinity?

A. Well, I don't know of any more than five. That is, I could not say any more than five. I know of some that sold for forty dollars.

Mr. CRAWFORD: That's all.

Redirect examination by Mr. OLIVER:

Q. Now how much less valuable is the farm of Hector McDonald rendered because of the fact that some two hundred acres is cut off away from the rest by the railroad?

Objected to by the counsel for the plaintiff as not redirect examination, incompetent and immaterial. The objection is overruled by the Court.

A. Well, I would think it would render it any how five dollars an acre less valuable for him.

Q. That's all.

Recross-examination by Mr. CRAWFORD:

Q. You mean five dollars an acre on the two hundred acres?

A. On the farm.

Q. How many acres in the farm?

A. About sixteen hundred acres, I think.

Q. Now what was the Hector McDonald farm reasonably worth in the market in 1905 prior to the construction of this railroad?

Objected to by the counsel for the defendants as immaterial. The objection is overruled by the Court. To which ruling counsel
70 for the defendants excepted and his exception was duly allowed by the Court.

Q. Per acre I mean, take it as a body,—average?

A. The whole farm?

Q. Yes?

A. I think at that time the whole farm was worth about forty thousand dollars.

Q. And what was the market value of that farm in 1908, after the railroad was completed through it?

Objected to by the counsel for the defendant as immaterial. The objection is overruled by the Court. To which ruling of the Court

counsel for the defendants excepted and his exception was duly allowed by the Court.

A. Well, I should think it ought to be worth about forty-five thousand anyway.

Q. Isn't it a fact, Mr. Mumford, that land in that vicinity of the same character as the Hector McDonald land, through which this railroad runs, enhanced in value by reason of the construction of this railroad from 1905 to 1908 at least ten dollars?

Objected to by the counsel for the defendants as immaterial. The objection is overruled by the Court. To which ruling of the Court counsel for the defendants excepted and their exception was duly allowed by the Court.

A. I don't think so,—taking all of that land.

Q. Don't you think it enhanced at least five dollars an acre?

A. Yes, I think it enhanced five dollars a*m* acre.

Q. If it enhanced five dollars an acre and he had fourteen hundred acres that would be seven thousand dollars, would it not?

Objected to as a matter of computation.

Mr. CRAWFORD: That's all.

Mr. OLIVER: I think that's our case.

Mr. CRAWFORD: We have nothing in rebuttal.

71 STATE OF OREGON,
County of Wallowa, ss:

I, H. R. Hanna, hereby certify that I am the Official Reporter of the Tenth Judicial District, including Wallowa County, of the State of Oregon; that I was present at the trial of the above entitled suit, and took down in shorthand the testimony of all the witnesses fully and accurately together with offers, objections and motions of respective counsel and the rulings of the Court thereon, and exceptions allowed by the Court; and that the foregoing typewritten pages numbered from 1 to 37 inclusive constitute a full and correct transcript of such shorthand notes.

Done and dated at Enterprise, Oregon, this 6th day of November, 1909.

H. R. HANNA.

72 In the Supreme Court of the State of Oregon.

THE OREGON RAILROAD & NAVIGATION COMPANY, a Private Corporation, Appellant,

vs.

HECTOR MCDONALD and MARGARET MCDONALD, Respondents.

Appeal from Circuit Court for Wallowa County.

The Honorable J. W. Knowles, Judge.

Argued and submitted at Pendleton, Oregon, Nov. 9, 1910.

T. H. Crawford (W. W. Cotton, Arthur C. Spencer on brief) for appellant.

Turner Oliver, for respondents.

MCBRIDE, *J.:*

Modified.

Filed Dec. 20, 1910. J. C. Moreland, Clerk of the Supreme Court.

73 This is a suit in equity brought by plaintiff to enjoin defendants from interfering with plaintiff in the construction of its branch line of railway from Elgin to Joseph, where the same crosses defendants' land in Wallowa county.

On September 18, 1905, plaintiff purchased of defendants the right-of-way for the railroad over their land, the amount so purchased comprising in all about 20 acres and the price paid being $600. Defendants, however, declined to sell this land until the following clause was inserted in the deed: "This conveyance is made on the condition that the Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years rfom the date hereof." Plaintiffs took possession of the land and had completed its grade along the whole of it by October 1907, and thereafter ceased work upon the road. Thereupon defendants fenced the land at each end, enclosing it with their other fields, and in August 1908, when work had been resumed on other portions of the road, they posted notices, warning all persons, particularly plaintiff, its agents and employees, to keep off the premises, and declaring themselves to be the owners and in possession thereof. Plaintiff brought this suit and secured a preliminary injunction under the protection of which it proceeded to complete the construction of its line. On the trial the court rendered a decree for defendants. Plaintiff appeals.

MCBRIDE, *J.:*

Plaintiff's principal contention is, that the limitation in the right-of-way deed from defendants is in legal effect a covenant and not a

condition. Forfeitures are not favored in law and the decisions abound in many subtle distinctions indulged in by the courts to avoid their frequently harsh consequences.

Before discussing the various and frequently unreconcilable decisions on this subject it may be well to recur to elementary definitions: Littleton defines a condition as follows: "Also, divers words (amongst others) there be, which by virtue of themselves
74 make estates upon condition; one is the word sub conditions"; and Coke, commenting upon this, says: "This is the most expresse and proper condition in deed, and therefore our author beginneth with it." (Coke upon Littleton, §328.)

Sheppard says: "Amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as proviso, ita quod, and sub conditione." Touch. *122.

Tested by these definitions, the language employed in the deed at bar would clearly seem to indicate an intent to create a conditional estate, defeasible on the failure of the grantee to perform the condition. It is true that the courts, in the cases cited by counsel, have held that similar language constitutes a covenant and not a condition, but in most, if not all, of these cases the words of condition were held to be modified or qualified by other language used in the same connection. Thus, in Post v. Weil, 115 N. Y. 361, where the restriction read: "Provided always, and these presents are upon this express condition, that no part of the granted premises shall ever be used or occupied as a tavern." The court held that the language used should be construed as a covenant running with the land, placing this construction upon the ground that the original grantor owned adjoining property which might be depreciated in value by the erection of a tavern in the vicinity. But in that case the grantor had an adequate remedy in equity to protect his estate from the erection of an obnoxious building, while in the case at bar defendants would have no such remedy to compel plaintiff to build its road.

Hawley v. Kafitz, 148 Calif. 393, was a case where plaintiff executed to defendant a conveyance which contained the following clause: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six (6) months from the date hereof a dwelling house to cost not less than fifteen hundred ($1,500.00) Dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." This was held by the court as a mere covenant
75 and not a condition subsequent, the court saying: "There is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that for non-compliance with the stipulation to build it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no lan-

guage that would create a condition subsequent, but the language actually employed, 'This deed is upon the express agreement,' implies a personal covenant and not a condition."

The distinction between the case cited and the one at bar is obvious.

In Ashulet Nat'l Bank v. City of Keene, 74 N. H. 148, the restriction clause in the deed was as follows: "Provided, however, and this deed is made upon the express condition, that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon, and for utilizing so much thereof as is not used for library purposes for a public park, and for no other purpose whatever; said grantee to take and enjoy the rents and income therefrom until such reasonable time as the same shall be devoted to the purposes aforesaid."

There *has* been some prior negotiations between the parties, which were in writing, and the court, taking into consideration these negotiations and the fact that the city was to have the use of the property and the rents and profits therefrom for a reasonable time, held that the language used was intended to create and define a trust rather than to impart a condition subsequent. The fact that the land was conveyed to the city to be used for a public purpose and therefore as a public trust, was dwelt upon by the court as a circumstance, indicating that a forfeiture was not intended.

It is impossible to discuss within the limits of this opinion all the cases cited by counsel, but, as before observed, it will be found in all that either in the conveyance itself or in some other instrument leading to it there is language qualifying, modifying, or tending to alter the significense of the alleged words of condition.

76 There is no case cited, and it is believed that none can be found, where a bald single condition, standing alone as this, has been perverted into a covenant. The case of Blanchard v. Detroit, Lansing & Lake Michigan R. Co., 31 Mich. 43; 18 Am. Rep. 142, is an instructive one. In that case a deed was made in consideration of $500 and the covenant to build a depot "hereafter mentioned." Thereafter it was set forth that the conveyance "is made upon the express condition" that the company shall erect and maintain on the land conveyed a station house "suitable for the convenience of the public," and that one train "each way shall stop at such depot or station each day, and that freight and passengers shall be regularly taken at such depot." The company failed to build such depot and the grantor attempted to compel a specific performance, claiming, as plaintiff does here, that the clause quoted constituted a covenant. The court say: "The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant or something capable of operating both ways, very frequently becomes very perplexing in consequence of the uncertain, ambiguous or conflicting terms and circumstances involved; and the books contain a great many cases of the kind and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate. Where, how-

ever, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity there is no room for refinement and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition and nothing but a condition, they yet meant that it should be exactly as a covenant."

So in the case at bar. We have an instrument in which the clause in controversy is couched in the exact language of a condition subsequent; plain, unambiguous and unqualified, and
77 we would perfect both law and language to hold that these apt words mean something different from their ordinary import.

The case of Gray v. Blanchard, 8 Pick. 284 is in point. Gray conveyed a parcel of land, adjoining his dwelling house by a deed, containing this restriction: "Provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof." It will be noticed that the contingency provided against was of trivial character. The only possible effect of placing a window on the north wall being that such window might overlook the grantor's premises and invade his privacy. But the court held the condition good and declared a forfeiture saying: "The words are apt to create a condition; there is no ambiguity; no room for construction; and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word 'provided,' alone, may constitute a condition, but here the very term is used which is often implied from the use of other terms. 'This conveyance is upon the condition,' can mean nothing more nor less, than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into covenants."

Nor do we see any ground, either in law or reason, for holding that a railway company cannot bind itself by conditions subsequent. It is true that it may acquire a fee in the land by condemnation, but when it goes into the market to buy as an ordinary purchaser it would seem that it ought to be permitted to make its own terms. Mills v. Seattle & M. Ry. Co., 10 Wash. 520; Nicoll v. New York & Earie R. Co., 12 N. Y. 121; and Blanchard v. Detroit, etc., R. Co., 31 Mich. 43, are railroad cases and in each of them a contract containing conditions subsequent, is held valid. In the case at bar the plaintiff, having induced defendants to execute the conveyance, which they otherwise declined to execute, by writing in the provision in question, is not in a position to urge that such provision was one which it had no right to accept.

78 It is urged that defendants are estopped from urging a forfeiture by reason of the fact that they voluntarily per-

mitted plaintiff to enter upon the land and construct its grade, and the case of Roberts v. Northern Pacific R. R. Co., 158 U. S. 1, is cited, among others, in support of this contention. It is true that where one stands idly by and permits a railway corporation to enter upon his land and make valuable improvements thereon he will be held to have acquiesced in their act, but this only applies to cases where the entry was not under a specific agreement. Here the entry was made under a contract, which by its terms practically authorized a re-entry by the grantors at the expiration of two years if a road was not constructed within that period. There was no misleading plaintiff to its prejudice. Both parties knew from the beginning the possible consequences of delay. Defendants were unwilling to sell a strip of land across their farm and allow the railroad company to hold it indefinitely, to the detriment of the balance of their holdings and to the possible exclusion of some other line of road. They wanted the road built within two years or they wanted their land back. Plaintiff, feeling confident that it could complete the road within that time, took the deed with the condition annexed to it. Owing primarily to the money panic and secondarily to weather conditions, they failed to comply with the conditions which no doubt seemed reasonable enough when the deed was made. Financial stringency has caused many people in this country to forfeit profitable contracts, but the courts cannot compel the beneficiaries of such contracts to be generous and extend the time for performance. We find no reason for holding that defendants have in any way waived this condition. After plaintiff had ceased work, defendants
79 built a fence across that part of the field which had been opened for the purpose of constructing the grade, and before plaintiff ever attempted to begin work at this point again they warned the company and its agents that they had taken possession. In this we think that they were within the legal rights and waived nothing.

So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous; plaintiff has constructed its road and has it in operation, thereby performing an important public function for a large and increasing population. It is reasonable to suppose that it is transporting freight and passengers, and, as is the custom of the country, the United States mail. It is to the interest of the public that it should continue to do so and that the defendants should not be allowed to acquire a portion of its road bed to the detriment of public travel. The condemnation of land for railway purposes is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once and forever. The pleadings show that this land is needed for the purpose of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract and all those

things which are usually shown in an action to condemn for a railroad right-of-way.

80 Having jurisdiction of this case, we have concluded to assume it for all purposes and to so modify the decree that plaintiff shall take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at $700, and the costs and disbursements of this suit; and that, upon payment of such sum and costs to the clerk of this court, plaintiff be decreed to be the owner in fee for railway purposes of such strip of land.

81 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 6th Day of March, 1911.

Whereupon on this Tues. the 14th day of March 1911, the same being the fifth judicial day of said term, there were present: Hon. Robert Eakin, Chief Justice; Hon. Thomas A. McBride, Associate Justice; Hon. Frank A. Moore, Associate Justice; Hon. Henry J. Bean, Associate Justice; Hon. George H. Burnett, Associate Justice; J. C. Moreland, Clerk, when the following proceedings were had:

THE OREGON RAILROAD & NAVIGATION COMPANY, Appellant.
vs.
HECTOR MCDONALD and MARGARET MCDONALD, Respondents.

Appeal from Wallowa County.

This cause having at Pendleton on the 9th day of November, 1910, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is partial error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below, in so far as the same dismisses the cause and suit, be and the same is reversed, and the remainder of said findings and decree are modified as herein set forth.

And the court having duly considered the allegations of the parties, and the proofs offered, makes the following findings of fact:

1. That the appellant is now, and at all times mentioned was a corporation, duly organized and existing under the laws of Oregon.

2. *The* the respondents are now, and at all times mentioned in the proceedings have been, husband and wife.

3. That at all times mentioned in the complaint the said
82 respondents were owners of a tract of land in the County of Wallowa, State of Oregon, described as the N. E. ¼ of the

S. E. ¼ of section 5; the S. W. ¼ of the S. W. ¼, and the S. W. ¼ of the S. E. ¼ of section 4; the N. ½ of the N. E. ¼ of section 9; the W. ½ of the N. W. ¼ and the S. E. ¼ of the N. W. ¼ of section 10, all in township 1 north of range 42 east of Willamette Meridian.

4. That on the 18th day of September, 1905, the respondents executed to the appellant a deed for a right-of-way across the lands described in finding 3, which right of way is described as follows: A strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of The Oregon Railroad & Navigation Company's railroad, as the same is staked out and located over and across the lands of *the* Hector McDonald and Margaret McDonald, situated in Wallowa County, State of Oregon, and designated as described in finding 3. That said deed contained the clause, "This conveyance is made on the condition that The Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof."

5. That the amount of land covered by said right-of-way deed was and is 21½ acres, and its value is now the sum of $700.00.

6. That within two years from the date of said deed the appellant entirely completed the construction of the grade along the said right-of-way, but did not resume the construction of the same until May, 1908, and the rails were not laid upon said grade across the lands of respondents until August, 1908, and that the appellant *how* has, and since August, 1908, has had in operation across said lands over said right-of-way its railroad trains, carrying freight, passengers and the United States Mail.

83 7. That in August, 1908, the respondents posted notices at the points where said right-of-way entered and left their land, notifying appellant not to enter said land.

And as conclusions of law the Court finds: That the clause in said deed, that the conveyance is made on the condition that the Company will construct its line of road over the premises within two years, was and is a condition subsequent, and not a covenant, and was so intended by the respondents at the time they executed the deed, but that the parties to this suit, having submitted themselves to a court of equity, are entitled to have the whole question settled, and that the appellant, is entitled to a decree of this Court, that upon its paying into this court the sum of $700.00, together with the costs and disbursements of this court, and of the court below, to have a decree quieting its title to said strip of land.

And the said respondents, having filed their cost bill in this court for their costs and disbursements in the court below and in this court, amounting to the sum of $144.75, and the said appellant, having deposited in this court, for the benefit of the respondents, the sum of $844.75.

Now therefore, based upon said acts of the parties upon the findings above set out, and upon the whole record in this cause, it is ordered, adjudged and decreed by the court that the appellant be, and is hereby adjudged and decreed to be the owner of the right-of-

way set out in finding 4, and its title thereto is quieted. And it is further adjudged and decreed that the respondents and all persons
84 claiming by, through or under them, or either of them, be and they are forever perpetually enjoined and restrained from interfering in any way with the appellant's use of said lands as a right-of-way.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a decree in accordance herewith, and that the Clerk of this Court turn over to the respondents the said sum of $844.75.

85 In the Supreme Court of the State of Oregon.

THE OREGON RAILROAD & NAVIGATION COMPANY, Appellant,
vs.
HECTOR MCDONALD and MARGARET MCDONALD, Respondents.

Come now the above named respondents by their attorney Turner Oliver, and move the Court for a modification of the decree heretofore rendered and entered in the above entitled cause, in this: that said decree ought to have simply held that the conditional grant made by the above named respondents in September, 1905, was forfeited by the above named appellant and the judgment and decree of the lower court should have been affirmed and judgment given in favor of respondents for costs, and these respondents move the Court to strike out that portion of the decree seeking to assume jurisdiction of the whole subject matter and to enter a decree of condemnation of respondents' property; and respondents ask this honorable Court to modify said decree accordingly and in behalf of this motion submit the argument hereto attached.

TURNER OLIVER,
Attorney for Respondents.

I hereby certify that I served the foregoing Motion on W. W. Cotton, Gen. Att'y for the Plaintiff on this Feb'y 13th, 1910, by depositing a duly certified copy thereof in a sealed envelope with the postage fully prepaid thereon plainly addressed to said W. W. Cotton at Portland, Oregon, in the Post Office at Salem, Oregon.

TURNER OLIVER,
Attorney for Respondents.

86 In the Supreme Court of the State of Oregon.

OREGON RAILROAD AND NAVIGATION COMPANY, Appellant,
vs.
HECTOR MCDONALD and MARGARET MCDONALD, Respondents.

Argument.

Our contention in this case on appeal was and is that the appellant had no standing in a court of equity; that it forfeited any rights it

held under the conditional grant when it violated the condition; that it had violated the condition on which the grant was made and forfeiture had been declared long before the appellant commenced this suit in the circuit court, and that its only remedy was an action at law to condemn the right of way for its road, and in such action the only competent testimony to be introduced regarding values would be that which would show the present value at the time of the trial, and not values that existed in the Fall of 1905, when the grant in controversy was made.

We claim that it is wrong in principle to permit a plaintiff who has a plain, speedy and adequate remedy at law, provided by statute to get into a court of equity in an attempt to violate the constitutional provisions that provide that property cannot be taken for public use until its value is first ascertained and paid.

In the present case, the appellant, after forfeiting all rights that it had in the grant, and at a time when this court holds that the respondents owned the land absolutely, because of this forfeiture, undertook to get into a court of equity for the purpose of
87 wrongfully depriving the respondents of their property without due process of law, and it seems to me an anomaly in law that this Supreme Court should hold that the contention of the respondents is correct and that the appellant had no equitable right in the property in dispute at the date of filing its complaint; that it violated the property rights of the respondents under protection of an injunction wrongfully issued out of the Circuit Court, at a time when a court of equity could not rightfully have jurisdiction, and yet that this Supreme Court would assume jurisdiction of the whole subject now and to do the very thing which it holds that the Circuit Court ought not to have done.

The appellant had a right, under our constitution and statutes of this state, to bring condemnation proceedings in the Circuit Court and after having tried the case before a jury of citizens of Wallowa County which would have determined the amount of damages, it would have a right to pay said damages into court and take its judgment of condemnation, as provided for by statute. This was a plain, speedy and adequate remedy which it had at law, and while such remedy exists it has no power to resort to equity.

The respondents also have a right when their landed estate is invaded by a public service corporation endowed with the power of eminent domain, to have the value of their property ascertained by a jury of citizens of their county and to have the money representing that value paid into court before their land would be condemned and taken away from them. This right is granted to them by the constitution and statutes of this state, and not even this Supreme Court has power to deprive them of that right.

The authorities also quite generally hold, and we contend that it is sound law, that when the appellant invaded the premises
88 of the respondents against the respondents' orders, the appellant was a trespasser, and that all improvements such trespasser placed upon the respondents' lands belong to the respondents, and in any action now brought by such trespasser to condemn

the lands of the respondents the jury would have a right also to ascertain the value of the improvements, as well as the value of the lands, and use the same as a basis for its verdict. In other words, the value of the lands to be condemned should be ascertained and fixed at the time of the verdict, and not five or six years ago when the land was not nearly so valuable as it is now, and when such verdict is rendered the jury would have no right to consider any payment made at the date of the deed in controversy in this case; such payment is voluntarily forfeited by the appellant, and can no longer be considered in any court.

We contend further that if the Supreme Court did not have power to assume jurisdiction over the whole matter, it has no evidence on which to base a finding of fact regarding the present value of the land and the land can only be condemned now by ascertaining and paying the present value of the land, with the improvements existing thereon at the present time.

There was some testimony taken at the trial which tended to show the value of the land in the condition it was in on September 18, 1905, the date of the grant which was afterwards forfeited voluntarily by appellant. This testimony was only introduced for the purpose of showing the inadequacy of the consideration named in the grant, and that unless the grantors had placed great value on the conditional clause in the deed that they would not have parted with the ownership in their land. In other words,
89 this testimony was only intended to be corroborative of the deed itself, and show more strongly the intention of the grantors in making the conditional conveyance. We were not allowed to show the value of the land at the date of the trial, but only at the date of the conveyance, about four years before the trial. Land had greatly increased in value during that four years, and the respondents' lands had increased in harmony with the increased values of other lands, but this was clearly immaterial under the issue joined, and the court did not permit such testimony to be given, and it was clearly right.

How then can this court presume to fix a value upon land in December, 1910, when it presumes to enter a decree of condemnation based on testimony which relates only to the values in September, 1905? We contend that it is clearly impossible, and that this court has no evidence on which to base a judgment at the present time.

But even if the testimony tending to show the values in September, 1905, were admissible to show the values now the judgment of the court is clearly inadequate in that it is not more than one-fifth of the value shown by the testimony to have existed in the lands at the date of the forfeited grant, and such judgment of the court would be arbitrary, and not in keeping with any of the principles of equity. If the action were being tried on September 18, 1905, before a jury in condemnation proceedings McDonald would have a clear right to recover:

(*a*) The reasonable market value of 20½ acres of land taken for the right of way.

(*b*) The reasonable market value of about 33 other acres of land rendered useless by being cut off in a half dozen little triangles away from his other lands.

90 (*c*) The value of a barn which was rendered useless by the construction of the railroad, and

(*d*) The value which would be destroyed by reason of the railroad passing through the farm and cutting it into two parts.

If the case were being tried by a jury now McDonald would have a right to introduce testimony covering all of these facts, together with testimony showing the value of the land now with the improvements placed thereon by the trespasser.

The testimony taken in this case was very short, and that portion of it relating to values was based wholly on conditions prevailing at the date of the deed, on September 18, 1905.

McDonald testified that the right of way itself took a little over twenty acres of his land, and rendered fifty other acres "of little use to me the way it lays now."

"Q. Do you know the reasonable value per acre of the land occupied by the right of way?"

Counsel objected, and the court said "The objection is sustained, unless you confine it to the time the deed was executed."

"Q. Do you know what was the reasonable value of the land at the time this deed was executed?"

This question was objected to because counsel had left out the word 'market' and the objection was sustained by the court.

"Q. Well the reasonable market value I mean?"
"A. I would put the valuation at $65 an acre."

On cross examination this witness showed that the value of the land had increased since the railroad had been built, and was asked concerning the land.

"Q. Isn't it a fact that a great deal of it is a gravel-bed,
91 that has never been cultivated successfully to any crop?"
"A. I think their line runs over, a little bit over half a mile that has never been cultivated at all. And the rest is,—some of it has been cultivated and raised crops on and the balance is hay land that has been mowed over."

The witness then, in answer to other questions, showed that some of his land covered by the right of way was of the same quality as the Sykes place, but the witness had ample water to irrigate all of his own lands, Sykes did not have any water right, and that Sykes asked the witness $70.00 per acre for his land; that eight acres of the right of way was substantially the same kind of land as the Sykes land, which was gravelly, and the rest of it was rich soil.

On re-direct examination the witness testified that land like the Sykes land "With irrigation produced well with anything in the way of clover, timothy or grain. I have raised now for two years right along joining the railroad track on gravel land forty-three and forty-five bushels to the acre of barley." "I own plenty of water

to irrigate what land I own there." "The portion that I had barley on this year, is just about the same condition of land as Sykes' land just beyond west of Sykes' land just across a sixty foot road I raised this year more than three ton of timothy to the acre, also just adjoining that and adjoining this timothy and grain land I had oats that went any way seventy-five bushels to the acre this year. I consider Mr. Sykes' land with water on will produce nearly the same as across the county road from it."

The witness then showed from a plat that there were four triangular pieces of ground severed entirely from his other lands by the railroad, and that these four triangles amounted, in the
92 aggregate, to thirty-three acres; that on the second of these tracts was a barn reasonably worth $750.00, which reaches over onto the right of way, that could not be rebuilt at that price, which was rendered of no value by the railroad. This witness was not asked as to the effect upon the value of his ranch as a whole that the separation into two fields by the railroad would have, but his testimony was clear that the four small triangular tracts rendered wholly useless contained thirty three acres in the aggregate, which added to the twenty and one half acres occupied by the right of way made fifty-three and one half acres which were lost to the respondents, and this at $65.00 an acre, which he testified was the reasonable market value on September 18, 1905, would make the land lost amount to $3,477.50, which added to the loss of the barn, $750.00, would make his actual loss, in being deprived of land and barn, $4,227.50, on September 18, 1905. The appellant put no witness on the stand to dispute this testimony.

Respondents also called E. D. Weaver, who testified that he was acquainted with the land covered in the dispute, having lived in that vicinity twelve years, who thought that the reasonable market value of all of Hector McDonald's lands in September, 1905, would be about $45.00 per acre, and that the two hundred acres lying north of the railroad track would be damaged at least $5.00 per acre, by being severed from the rest of the ranch. His testimony was also not disputed.

If fifty-three and one half acres of land worth $45.00 per acre were taken by the railroad company, the land itself taken would be worth $2,407.50, and a loss of $5.00 per acre on two hundred acres would make another $1,000, which added to the loss of the barn, $750.00, would be the total loss, in the opinion of this witness, of $4,157.50.

93 C. W. Mumford testified that he thought that the value of Hector McDonald's whole ranch in the Fall of 1905, would be from $30.00 to $35.00 per acre, and that the building of the railroad would damage the whole ranch of 1600 acres at least $5.00 per acre, because of the general interference with farming operations by reason of having a railroad run across the land. So that the testimony of this witness would show a loss of at least $30.00 per acre for fifty-three and one half acres and $5.00 per acre for 1600 acres, making a total loss, in the opinion of this witness, of $9,605.00, and his testimony was not disputed by any witness for the appellant.

The only other testimony given was by Leonard Couch, a real estate agent of Wallowa, who thought that the reasonable market value of the twenty and one half acres covered by the right of way at the date of the deed in September, 1905, would be $700.00, and the reasonable market value of the McDonald lands at that time would be from $30.00 to $40.00 per acre, and the cutting of the place by the railroad would reduce the value of the two hundred acres north of the track at least $5.00 per acre. He did not testify as to how much the value of the land south of the railroad would be reduced by having the farm cut in two by the railroad. If his opinion is correct, McDonald's loss would be $1,320.00 for the thirty-three acres cut off in small triangles, and thus rendered useless; $700.00 for the right of way itself; $1,000 depreciation in value of the two hundred acres north of the railroad and $750.00 loss of the barn would fix the total loss to Hector McDonald on September 18, 1905, at $3,770.00.

There was no other testimony at the trial on the question of values and damages.

94 This testimony applied wholly to September 18, 1905, the date of the deed, and shows clearly that in the opinion of these witnesses the loss could not have been less than $3,770.00 and would range from that up to $9,605.00. So that if this court were undertaking to determine the amount of McDonald's loss, which should be ascertained and paid before the appellant could take his land, it could not decree an amount less than $3,770.00, and we contend that, based on the present land value, McDonald would be entitled to receive not less than ten times the amount fixed by this court.

Finally, The principles of law involved in this case are all elementary and require no citations. It is fundamental that private property cannot be taken for private uses and cannot be taken for a public use until the value has been first ascertained and paid:

That a suit or action can only be tried out on the pleadings in the case and no party or court has power to make issues not covered by the pleadings:

And that on a trial for the condemnation of private property for a public use evidence is admissible to show the value of the property and the amount of the losses sustained by the owner at the time of the verdict, and that evidence touching any other time is irrelevant and immaterial:

Since there was no evidence in the case touching the value of the land at the time of the trial there was no evidence on which the Court could base a finding of the amount that ought to be paid to the respondents. The only evidence in the case tending to fix values was directed at the values prevailing at the date of the conditional grant in September, 1905, which would be far less than the

95 values now prevailing, but the lowest values fixed by any witness at the time of the conditional grant was over $3,770.00, and the highest was over $9,000.00. This was a wide range

based wholly on opinions, and all parties concerned are entitled to a definite finding by a jury of the citizens of Wallowa County.

Respectfully submitted,

TURNER OLIVER,
Attorney for Respondents.

(Indorsed:) "Case No. P. 413. Drawer No. 828. In the Supreme Court of the State of Oregon. November Term, 1911. At Pendleton. Oregon Railroad & Navigation Company, Appellant vs. Hector McDonald and Margaret McDonald, Respondents. Filed Feb'y 13, 1911. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy."

96 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 6th day of March 1911.

Whereupon on this Tuesday the 14th day of March 1911 the same being the fifth judicial day of said term, there were present: Hon. Robert Eakin, Chief Justice; Hon. Thomas A. McBride, Associate Justice; Hon. Frank A. Moore, Associate Justice; Hon. Henry J. Bean, Associate Justice; Hon. George H. Burnett, Associate Justice; J. C. Moreland, Clerk, when the following proceedings were had:

In the Matter of the Petitions for Rehearing Heretofore Filed in WALTON v. MOORE, and Other Causes Pending.

Now at this time it is ordered by the court that the Petitions for rehearing in the following causes be and the same are hereby overruled:

S. W. Miles Appellant v. V. Hemenway Respondent;

O. R. & N. Co. Appellant v. Hector McDonald et ux. Respondents;

Title Guarantee & A. Co. Appellant v. Claude Nasburg, Respondent;

F. V. Martin et al. Respondent v. O. R. & N. Co., Appellant;

Emma F. Walton et al Appellants v. George L. Moore Respondent;

M. J. Kinney Appellant v. City of Astoria, Respondent.

97 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Hector McDonald and Margaret McDonald vs. The Oregon Railroad & Navigation Company, a corporation, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at my office in Salem, Oregon, this 31st day of January 1913.

[Seal Supreme Court, State of Oregon.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

98 In the Supreme Court of the State of Oregon.

THE OREGON RAILROAD & NAVIGATION COMPANY, a Corporation, Plaintiff and Appellant,
vs.
HECTOR McDONALD and MARGARET McDONALD, Defendants and Respondents.

Assignments of Error by the Defendants, Hector McDonald and Margaret McDonald, upon Petition by Them Filed for the Allowance of Writ of Error to Review in the Supreme Court of the United States the Final Judgment Herein.

Come now the defendants above named, Hector McDonald and Margaret McDonald, and present and file herewith their petition for writ of error herein to review in the Supreme Court of the United States the final judgment and decree of the Supreme Court of the State of Oregon in this cause, and say that there are errors in the record and proceedings in this cause; and for the purpose of having the same reviewed by the Supreme Court of the United States these defendants now make the following

Assignments of Error.

I.

The Supreme Court of the State of Oregon erred in modifying the decree entered in said cause by the Judge of the Circuit Court of the State of Oregon for the County of Wallowa, in regard to the following described lands, to-wit:

The northeast quarter of southeast quarter (N. E. ¼ of S. E. ¼) of section five (5), the southwest quarter of southwest quarter (S. W. ¼ of S. W. ¼) and the southwest quarter of southeast quarter (S. W. ¼ of S. E. ¼) of Section four (4) and the north
99 half of northeast quarter (N. ½ of N. E. ¼) of section nine (9) and the west half of northwest quarter (W. ½ of N. W. ¼) and the southeast quarter of northwest quarter (S. E. ¼ of N. W. ¼) of section ten (10), all in township one (1) north, of range forty-two (42) east of the Willamette Meridian.

And in holding that the twenty one and ½ acres of said lands claimed by the plaintiff as a right of way for its railroad, was worth at the time of entering the decree of the Supreme Court only the sum of Seven Hundred ($700.00) Dollars; and in condemning

said property to the use of the plaintiff on the payment of Seven Hundred ($700.00) Dollars; because there were no pleadings on which to base such finding, and no testimony to support such finding, and this court had no jurisdiction to make such or any finding herein, and was therefore invalid and violative of the Fifth Amendment to the Constitution of the United States, as well as Section 18 Article I of the Oregon Constitution, in that it deprived these defendants of their property without due process of law, and took defendants' property from them for a public use without just compensation; and were also violative of the VII Amendment to the Constitution of the United States, as well as Section 17 of Article I of the Oregon Constitution, in that they deprived the defendants of their right of trial by jury in a civil case; and were, also, violative of Section 1 of the XIV Amendment to the Constitution of the United States, in that they deprived these defendants of their property without due process of law, and denied to these defendants the equal protection of tne law.

All of which errors were committed in the course of the decision of the said cause, over the objection and exception of the de-
100 fendants, as well in the Supreme Court of the State of Oregon as in the said Circuit Court of the State in which this said suit was tried, as will more fully appear by the record of this cause now in the Supreme Court of the State.

II.

The Supreme Court of the State of Oregon erred in holding and deciding that these defendants had submitted themselves to a court of equity or that said Supreme Court, acting in its capacity, as a court of equity, had any jurisdiction to condemn the lands belonging to these defendants for the sum of Seven Hundred ($700.00) Dollars, or any other sum; and in holding that the plaintiff and appellant was entitled to a decree condemning said lands or quieting its title to said lands, or any part thereof, or that the pleadings did not make any such issue and there was no evidence on which such finding, could be based, and this Supreme Court had no jurisdiction to make any such finding or decree; and such finding and the enforcement of such decree in this cause was in effect a denial to these defendants, in violation of Section 1 of Article 14 of the Constitution of the United States, the equal protection of the law, and constituted a taking of the property of these defendants without due process of law, and thereby a right, privilege and immunity claimed by these defendants under the Constitution of the United States was denied these defendants, and the decision of the Court was against a right, privilege and immunity claimed by these defendants in this cause, all of which will more fully appear by an inspection of the record herein.

101 ## III.

The Supreme Court of the State of Oregon erred in ordering, adjudging and decreeing, "That the appellant be, and is hereby,

adjudged and decreed to be the owner of the right of way, set out in finding four, and its title thereto is quieted," and in adjudging and decreeing, "That the respondents and all persons claiming by, through or under them, or either of them, be and they are forever perpetually enjoined and restrained from interfering in any way with the appellant's use of said lands as a right of way"; and erred in further ordering, "That this cause be remanded to the Court below, from which this appeal was taken, with directions to enter a decree in accordance herewith"; and erred in not simply affirming the judgment and decree of the lower court, and entering judgment in favor of respondents for their costs and disbursements on appeal; and erred in condemning defendants' property to the use of the plaintiff company, and in depriving defendants thereof, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprived defendants of their property without due process of law;

And in holding and deciding that said findings and decree did not deny to these defendants the equal protection of the law or deprive these defendants of their property without due process of law; and in not deciding as claimed and contended for by these defendants, as well before the Supreme Court as the trial Court in which this suit was brought and tried; that there was only one question covered by the pleadings and evidence in this case, that the grant made on September 18, 1905, was a conditional grant and the condition was voluntarily broken by the plaintiff company,
102 and the title forfeited to the defendants, and that the Supreme Court of the State of Oregon had no jurisdiction or power in a Court of Equity on the issues joined in the pleadings in this case, and the testimony, to condemn defendants' lands and give the same to the plaintiff, and in so doing it violated the provisions of the V Amendment to the Constitu-ion of the United States and the VII Amendment to the Constitution of the United States and Section 1 of the XIV Amendment to the Constitution of the United States, as well as Sections 17 and 18 of Article I of the Constitution of the State of Oregon and Section 3 of Article VII of the Constitution of the state of Oregon.

Wherefore, For the errors above assigned, these defendants, Hector McDonald and Margaret McDonald, pray for a reversal of said decree of the Supreme Court of the State of Oregon, and for such disposition of the cause as will be in accordance with the Constitution of the United States in such cases made and provided.

All of which is respectfully submitted.

TURNER OLIVER,
Attorney for Defendants and Respondents.

103 [Endorsed:] No. —. In Supreme Court for the State of Oregon. The Oregon Railroad and Navigation Company, a corporation, appellant, vs. Hector McDonald & Margaret McDonald, respondents, defendants. Assignments of Error. Filed Dec. 23, 1912. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy. From the office of Turner Oliver, La Grande, Oregon, attorney for respondents.

104 In the Supreme Court of the State of Oregon.

THE OREGON RAILROAD & NAVIGATION COMPANY, a Private Corporation, Plaintiff and Appellant,

vs.

HECTOR McDONALD and MARGARET McDONALD, Defendants and Respondents.

Petition of the Respondents, Hector McDonald and Margaret McDonald, for Allowance of Writ of Error to Review in the Supreme Court of the United States the Final Judgment and Decree Herein.

To the Chief Justice of the Supreme Court of the State of Oregon:

This the petition of the said Hector McDonald and Margaret McDonald, the defendants and respondents in this cause, respectfully shows:

That on the 14th day of March, A. D. 1911, a final judgment and decree in this suit was entered by this Supreme Court, which judgment and decree was against these defendants and respondents and in favor of the above named plaintiff and appellant, in that it condemned defendants' lands to the use of the plaintiff, by which said judgment and decree these defendants were aggrieved, in that said judgment and decree and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these
105 defendants and respondents, all of which will appear more in detail in the assignments of error filed with this petition in the Supreme Court of the State, being the highest court of the state of Oregon in which a decision in this matter could be had. These defendants now conceiving themselves aggrieved by said final decision of the Supreme Court of the state of Oregon, in rendering a judgment condemning the lands of these defendants to the use of the plaintiff, pray that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the state of Oregon, to the end that the judgment and decree herein may be reviewed by the Supreme Court of the United States; and these defendants do now pray for an order fixing the amount of the supersedeas bond to be furnished by these defendants upon such writ, these defendants now claiming the right to supersede the said judgment and decree of this court on the giving of said bond.

And these defendants now showing, as will be more fully made to appear by an inspection of the record in this cause and the assignments of error herewith presented and filed, that in their defense in this proceeding these defendants, claimed and now claim by way of defense, certain rights, privileges and immunities under the Constitution of the United States, which were denied to them by the judgment and decree herein, and that thereby federal questions were raised by the record of this cause, entitling the Supreme Court of the United States to review the judgment herein.

HECTOR McDONALD &
MARGARET McDONALD,
Defendants and Respondents.
By TURNER OLIVER,
Their Attorney.

106 In the Supreme Court of the State of Oregon.

At SALEM, OREGON, *December 19th*, A. D. 1912.

Desiring to give petitioners a right to test in the Supreme Court of the United States the questions in the foregoing petition, it is Ordered that a Writ of Error be allowed to said Court, upon petitioners filing a bond in the sum of One Thousand ($1,000.00) Dollars, to the approval of the undersigned Chief Justice; and said bond when approved shall act as a supercedeas.

In Testimony Whereof, Witness my hand this 19th day of December, A. D. 1912.

ROBERT EAKIN,
Chief Justice of the Supreme Court of Oregon.

107 [Endorsed:] No. —. In the Supreme Court for the State of Oregon. The Oregon Railroad and Navigation Company, a corporation, appellant, plaintiff vs. Hector McDonald and Margaret McDonald, respondents, defendant-. Petition for Writ of Error. Filed Dec. 23, 1912. J. C. Moreland, clerk, by Arthur S. Benson, deputy. From the office of Turner Oliver, La Grande, Oregon, attorney for respondents.

108 (Copy.)

In the Supreme Court of the United States.

HECTOR MCDONALD and MARGARET MCDONALD, Plaintiff- in Error,
vs.
THE OREGON RAILROAD & NAVIGATION COMPANY, a Private Corporation, Defendants in Error.

Bond on Writ of Error.

Know all Men by These Presents:

That we, Hector McDonald as principal, and Peter A. McDonald as surety, are held and firmly bound unto the Oregon Railroad & Navigation Company, incorporated, in the sum of One Thousand ($1,000) Dollars, to be paid to said Oregon Railroad & Navigation Company, its successors or assigns, to which payment well and truly to be made, we jointly and severally bind ourselves, and our legal representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 10th day of December, A. D. 1912.

Whereas, the above named defendant, Hector McDonald, has sued out a writ of error to the Supreme Court of the United States to reverse the decree in the above entitled cause by the Supreme Court of the state of Oregon.

Now, therefore, the condition of this obligation is such that if the above named Hector McDonald shall prosecute said writ to effect

and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) HECTOR McDONALD. [SEAL.]
" PETER A. McDONALD. [SEAL.]

109 STATE OF OREGON,
County of Union, ss:

I, Peter A. McDonald, being first duly sworn, say, that I am surety above named and that I am a resident householder and freeholder, within the State of Oregon and am worth the sum of $2,000.00 over and above all my just debts and exclusive of property exempt from execution.

In witness whereof, I hereunto set my hand this December 10, A. D. 1912.

PETER A. McDONALD.

Subscribed and sworn to before me this 10th day of December, A. D. 1912.

[SEAL.] TURNER OLIVER,
Notary Public for Oregon.

STATE OF OREGON,
County of Union, ss:

I, Turner Oliver, being first duly sworn, upon my oath say: that I have made diligent search and inquiry, concerning the amount of property, real and personal, and its value, owned by Mr. Peter A. McDonald, the person whose name is subscribed to the foregoing undertaking and bond, as a result of such investigations, believe him to be safely worth two thousand ($2,000) Dollars, over and above all just debts and liabilities and property exempt from execution.

TURNER OLIVER,
Notary Public for Oregon.

Subscribed and sworn to before me on this the — day of December, A. D. 1912.

[SEAL.] EUGENE ASHWILL,
Notary Public of Oregon.

STATE OF OREGON,
County of Union, ss:

The foregoing bond was submitted to and approved by me on this 19 day of December, A. D. 1912.

ROBERT EAKIN,
Chief Justice.

110 [Endorsed:] (Copy.) No. —. In the Supreme Court of the United States. Hector McDonald and Margaret McDonald, Plaintiffs in Error, vs. The Oregon Railroad and Navigation Company, a Corporation, Defendant in Error. Supercedeas Bond on Writ of Error. Filed Dec. 23, 1912. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. From the office of Turner Oliver, La Grande, Oregon, Attorney for ——.

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and decree of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the State of Oregon in which a decision could be had in the said suit between the Oregon Railroad & Navigation Company, Incorporated, and Hector McDonald and Margaret McDonald, wherein was drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or the laws of the United States, and the decision was in favor of such validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or Statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Hector McDonald and Margaret McDonald, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

112 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court, Oregon.]

A. M. LANNON,
Clerk District Court United States, District of Oregon.

Allowed this December 20th, 1912.
ROBERT EAKIN,
Chief Justice Supreme Court of the State of Oregon.
Attest:
——— ———,
Clerk of the Supreme Court of the State of Oregon.

113 [Endorsed:] No. —. In the Supreme Court for the State of Oregon. The Oregon Railroad and Navigation Company,

a Corporation, Appellant, Plaintiff, vs. Hector McDonald and Margaret McDonald, Respondents, Defendant-. Writ of Error. Filed Dec. 23, 1912. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. From the office of Turner Oliver, La Grande, Oregon, Attorney for Respondents.

114 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, clerk of the Supreme Court do hereby certify that there was lodged with me as such clerk on the 23d day of December 1912, in the matter of Hector McDonald and Margaret McDonald versus The Oregon Railroad and Navigation Company, a corporation,

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salem, Oregon, this 31st day of January 1913.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

115 United States of America to the Oregon Railway & Navigation Company, Incorporated, Greeting:

You are hereby notified that in a certain case in equity in the Supreme Court of the State of Oregon, wherein the Oregon Railway & Navigation Company was plaintiff and appellant and Hector McDonald and Margaret McDonald were defendants and respondents, an appeal has been allowed the respondents therein to the Supreme Court of the United States.

You are hereby cited and admonished to be and appear in said Supreme Court at Washington within sixty days from the date hereof, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Robert Eakin, Chief Justice of the Oregon Supreme Court, at Salem, Oregon, on this the 28th day of December, A. D. 1912.

ROBERT EAKIN,
Chief Justice of the Supreme Court of the State of Oregon.

Service of the foregoing citation is hereby accepted at Portland, in Multnomah County, Oregon, on this 30th day of December, 1912.

A. C. SPENCER,
General Attorney for the Above Named Appellant and Defendant in Error, the O. R. & N. Company.

[Endorsed:] In the Supreme Court of the State of Oregon. The Oregon Railroad and Navigation Company, Plaintiff and Appellant, vs. Hector McDonald and Margaret McDonald, Defendants and Respondents. Citation on Writ of Error. Filed Jan. 2, 1913. J. C. Moreland, Clerk of the Supreme Court. By —— ——, Deputy.

116-118 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of Oregon, in the city of Salem, this 31st day of January, 1913.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

Costs of Suit.

Plaintiff's (McDonald's) costs $144.75 paid into court by The Oregon Railroad & Navigation Co.;

Costs of transcript, $45.00 paid by Hector McDonald and Margaret McDonald.

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

119 In the Supreme Court of the United States, October Term, 1913.

No. 463.

HECTOR MCDONALD and MARGARET MCDONALD, Plaintiffs in Error,
vs.
THE OREGON RAILROAD AND NAVIGATION COMPANY, Defendant in Error.

Stipulation.

Whereas, there is incorporated in the record from the Supreme Court of the State of Oregon in this cause, two blue print maps designated in the record as Exhibit "AA" and Exhibit "B" respectively, and

Whereas, said maps are not necessary nor pertinent to the consideration of any assignment of error made by the plaintiffs in error in this court and cause,

Now, therefore, it is stipulated by the parties hereto appearing

by their respective attorneys, that in printing of the record of this cause in this court, said blue print maps be omitted therefrom.

Dated at Portland, Oregon, this 31st day of October, 1913.

GEO. E. CHAMBERLAIN,
TURNER OLIVER,
Attorney- for Plaintiffs in Error.
HENRY W. CLARK,
W. W. COTTON, AND
A. C. SPENCER,
Attorneys for Defendant in Error.

120 [Endorsed:] In the Supreme Court of the United States. Hector McDonald and Margaret McDonald, Plaintiffs in Error, vs. The Oregon Railroad & Navigation Company, Defendant in Error. Stipulation. No. 979.

121 [Endorsed:] File No. 23,554. Supreme Court U. S., October term, 1913. Term No. 463. Hector McDonald et al., P. E., vs. The Oregon R. R. & Navigation Co., Inc. Stipulation to omit maps in printing record. Filed Nov. 14, 1913.

Endorsed on cover: File No. 23,554. Oregon Supreme Court. Term No. 463. Hector McDonald and Margaret McDonald, plaintiffs in error, vs. The Oregon Railroad and Navigation Company, Incorporated. Filed February 19, 1913. File No. 23,554.

Supreme Court
of the United States

October Term, 1913

HECTOR McDONALD and
MARGARET McDONALD,
Plaintiffs in Error

against

THE OREGON RAILROAD AND
NAVIGATION COMPANY, a
Corporation,
Defendant in Error

No. 668

Brief for Plaintiffs in Error on Motion to Dismiss Writ of Error

TURNER OLIVER,
GEORGE E. CHAMBERLAIN, and
WILL R. KING,
Attorneys for Plaintiffs in Error.

W. W. COTTON,
ARTHUR C. SPENCER and
H. W. CLARK,
Attorneys for Defendant in Error.

Supreme Court
of The United States

October Term, 1913

HECTOR McDONALD and MARGARET McDONALD,
Plaintiffs in Error

against

THE OREGON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Defendant in Error

No. 463

Brief for Plaintiffs' in Error on Motion to Dismiss Writ of Error

Statement of Facts.

In September, 1905, the plaintiffs in error conveyed to the defendant in error a strip of land 100 feet wide across the farm of the plaintiffs in error, which strip contained about 21 acres of land, for a

railroad right of way. The grant was made on condition that the railroad would be completed and in operation in two years. The defendant in error did not complete the road in two years, and in October, 1907, abandoned the work, and the plaintiff in error declared a forfeiture and repossessed the land. In August, 1908, the defendant in error threatened to recommence work on the forfeited grant. The plaintiffs in error had posted trespass notices at each end of the land covered by the conditional grant and notified defendant in error by mail that it had forfeited any rights it had and warned it not to make any further claim under the conditional grant. Thereupon, the defendant in error filed a suit in equity in which it claimed to be the owner of the land in controversy and asked that a temporary injunction issue restraining the plaintiffs in error from interfering with said land, and that upon a hearing said injunction be made perpetual, and that the defendant in error be decreed to be the owner in fee simple of said land. The Circuit Court granted temporary injunction as prayed for.

The plaintiffs in error answered setting up their ownership of the land in controversy and right of possession; the conditional conveyance made; the forfeiture by defendant in error; and asked that the injunction be dissolved and that the plaintiffs in error be decreed the owners of the land in controversy and entitled to the possession of the same.

The reply admitted the deed in language and form as set up in the answer, but denied that it was a conditional conveyance.

The case was not tried until November, 1909. The Circuit Court required testimony as to the *intention* of the grantors in placing the conditional clause in the deed, but did not permit any testimony as to value *except at the time of making the deed in Sept., 1905,* and among the findings of fact made by the Court were,— (a) that the right of way deed covered twenty and one-half acres, worth $700.00 on Sept. 18, 1905; (b) that the right of way in controversy would cut off 200 acres of the lands of these plaintiffs in error from the main body diminishing the value of that 200 acres $1000.00; (c) that the right of way would destroy wholly the use of a barn worth $750.00; that the condition was written in the deed with a pen by the agent of the defendant in error before the plaintiff in error would sign the deed, and as a conclusion, the Court found that the grant was made on a condition subsequent and not a covenant, and was so intended by the grantors; and the Court decreed that the plaintiffs in error were the owners in fee and entitled to the possession of all of the lands described in the complaint including the alleged right of way; that the defendant in error had voluntarily abandoned the premises and forfeited any right it ever had therein; that the injunction be dissolved; and the case dismissed.

The defendant in error appealed to the Supreme Court of the State of Oregon which affirmed the decision of the lower court that the deed was conditional and that defendant in error had forfeited any rights it ever had under the deed.

But the Supreme Court *presumed* that the defend-

ant in error had completed its railroad across the premises in controversy while this suit was pending. It *presumed further* that the defendant in error was doing business and carrying freight, passengers and U. S. mail "because railroads generally do," and based on these presumptions, the Supreme Court in Feb., 1911, *without any pleadings or testimony on which to base the same,* decreed that if the defendant in error would pay $700.00 to the Clerk of the Supreme Court for the benefit of the plaintiffs in error, *the Supreme Court would condemn the right of way to the defendant in error.* The defendant in error did turn over to the Clerk of the Supreme Court the $700.00 and on the 13th day of February, 1911, the plaintiffs in error filed in the Supreme Court of the State of Oregon their motion for a modification of the decree and that it should end with the affirmance of the decree of the lower court, and asked that all that part of the decree seeking to assume jurisdiction of and condemnation of the property of plaintiffs in error be revoked, and the plaintiffs in error in said motion represented that that portion of the opinion of the Supreme Court presuming to condemn the lands of the plaintiffs in error to the defendant in error *was beyond the power of the Supreme Court* in that the Court had no power to deprive the plaintiffs in error of their lands, and the attempt to do so was in violation of the constitutional provisions that private property could not be taken for public use until its value was first ascertained and paid; *that there was no evidence nor pleadings on which the State Supreme Court could base a condem-*

nation of the property in controversy even if such Supreme Court had the power to condemn property; that the defendant in error had a plain, speedy and adequate remedy at law in the right of eminent domain provided by statute to condemn a right of way across the premises in controversy, *and the plaintiffs in error had a constitutional right, as well as statutory, to have the matter determined by a jury of the citizens of Wallowa County,* where the land is located,—a right guaranteed by the constitution which the Supreme Court could not take away; *that the attempt of the State Supreme Court to take the property in controversy from the plaintiff in error and give the same to the defendant in error was a taking of the property of plaintiff in error without due process of law,* and arbitrarily, without a scintilla of evidence, nor any pleadings on which to base such action.

This motion was filed in the Supreme Court on Feb. 13, 1911, and was afterward overruled by the Supreme Court, and on the 14th day of March, 1911, the Supreme Court of Oregon entered its decree taking the property of plaintiffs in error and giving the same to defendant in error.

The plaintiffs in error contend that this violated the fifth, seventh and fourteenth amendments of the Constitution of the United States, and by a writ of error regularly granted by the Chief Justice of the Oregon Supreme Court has brought the whole record up to this Supreme Court of the United States for review.

Argument.

The decision of the Supreme Court of Oregon was made and opinion handed down on December 20, 1910, and is found reported in 58 Or., commencing on p. 228. The first 8 pages of the opinion sustained in everything the decision of the lower court. This is as far as the decision ought to have gone, and was all that the pleadings in the case gave the Supreme Court any jurisdiction to do, but the Supreme Court *on its own motion*, and *without any request from either party* added paragraph 4, (commencing on page 236) as follows:—

"So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous. Plaintiff has constructed its road and has it in operation, thereby performing an important public function for a large and increasing population. It is reasonable to suppose that it is transporting freight and passengers, and, as is the custom of the country, the United States mail. It is to the interest of the public that it should continue to do so, and that the defendants should not be allowed to acquire a portion of its roadbed to the detriment of public travel. The condemnation of land for railway purpose is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once

and forever. The pleadings show that this land is needed for the purpose of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity, and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract, and all those things which are usually shown in an action to condemn for a railroad right of way.

"Having jurisdiction of this case, we have concluded to assume it for all purposes and to so modify the decree that plaintiff shall take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at $700.00, and the costs and disbursements of this suit; and that, upon payment of such sum and costs to the clerk of this court, plaintiff be decreed to be the owner in fee for railway purposes of such strip of land."

The plaintiffs in error looked upon this portion of the Supreme Court's decision and opinion as violating the rights, privileges and immunities guaranteed by the Constitution of the United States and also certain rights guaranteed by the Constitution of the State of Oregon, and therefore filed a petition asking the Supreme Court to modify its decision and decree by leaving out that portion quoted above. In this motion and the argument attached to and made a part of the motion and filed as one document, the plaintiffs in error directed the attention of the Supreme Court to the fact that *there were no pleadings in the case on which to base a condemnation*, and *no testi-*

mony on which to base a finding of value; that the attempt on the part of the Supreme Court of the State of Oregon to fix damages and to condemn land *deprived the plaintiffs in error of their constitutional right to trial by jury,* and *took the property* of plaintiffs in error *without due process of law in violation of their constitutional rights, privileges and immunities.* This motion was considered for more than a month, a copy of the same being in the hands of each of the five Justices of the Supreme Court from the 13th of February until the 14th of March when the motion was overruled as shown on page 237 of the 58th Oregon, and on the same day the decree complained of was entered. It is true that no specific mention of this motion appears in the decree, but we apprehend that this Supreme Court of the United States will not permit a state supreme court to assume dictatorial power in violation of the constitutional rights of a citizen and deprive this Supreme Court of jurisdiction to inquire into its unconstitutional acts by simply not mentioning in its decree the fact that it had considered for a month and then denied the motion and petition of plaintiffs in error to so modify its decree as not to violate the constitutional rights, privileges and immunities guaranteed to them by the Constitution of the United States.

From the language used in the motion, there could be no possible doubt in the minds of the Justices that the plaintiffs in error claimed a right to trial by jury provided by the 7th amendment to the United States Constitution, as well as the 1st and 7th articles

of the State Constitution, and claimed the privilege of due process of law as provided by the 5th and 14th amendments to the Constitution of the United States, and that their property could not be taken without just compensation as provided for in the 5th amendment of the Federal Constitution, and by Section 18 of Article 1 of the Oregon State Constitution, which provides that private property cannot be taken for public use (except by the State) without just compensation first assessed and tendered.

The State Supreme Court did act *ultra vires*, and *arbitrarily*, and in violation of the constitutional rights of the plaintiff in error and deprived them of their property without due process of law when it, on March 14, 1911, deprived them of the right of a jury trial, and *without any evidence as to the damage to them on that date arbitrarily fixed $700.00 as damages and declared that their property belonged from that time to the defendant in error.*

Dartmouth College Case, 4 Wheaton 518

Scott v. McNeal, 154 U. S. 34 at p. 45, 38 L. ed. 901

C. B. & Q. R. Co. v. Chicago, 166 U. S. 228 at pp. 235 to 242, 41 L. ed. 984 et seq.

St. L. etc., R. Co. vs. Taylor, 210 U. S. 281 at 293, 52 L. ed. 1061 at 1067.

If the 7th amendment applies only to Federal Courts, nevertheless, when the Oregon Constitution makes the same provision which is ignored by the State Supreme Court, and the property of a citizen

taken in defiance of such constitutional inhibition, the citizen is surely deprived of his property without due process of law and is protected by the 14th amendment.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 233, 41 L. ed. 979.

Scott v. McNeal, 154 U. S. 45, 38 L. ed. 896.

Civil Rights cases, 109 U. S. 11, 27 L. ed. 835.

"Due process of law is its regular administration, through courts of justice, by a timely and regular course of proceeding to judgment and execution. As a rule, it includes parties, *regular proceedings and a trial*, according to the settled course of proceedings."

Den v. Hoboken etc., 59 U. S. 372

Ries v. City of Watertown, 86 U. S. 72

Barrer v. Kelly, 11 Minn., 480

Pierson v. Yewdall, 95 U. S. 294

Scott v. McNeal, 154 U. S. 46, L. ed. 901

There can be no question that the decision and decree of the Oregon Supreme Court did have the effect of depriving plaintiffs in error of their property without due process of law but the main question raised by the motion of the defendant in error is as to whether a federal question was actually raised in the Oregon Supreme Court so as to give this Supreme Court jurisdiction to inquire into the same on a writ of error.

There was no federal question in the case prior

to the decision of the Oregon Supreme Court on December 20, 1910. The defendant in error by its complaint in the circuit court of Wallowa County, Oregon *did not seek to condemn any of the lands in controversy*, but claimed to be the owner of the land and asked that defendants in that suit (plaintiffs in error here) be enjoined from interfering with its possession. The defendants in that court (these plaintiffs in error) claimed to be the owners and in possession and entitled to possession. The Circuit Court, after trial, decided in favor of defendants. The plaintiff appealed, and the *Supreme Court of Oregon decided with the Circuit Court on every point involved in the pleadings and covered by the testimony;* but it then went *outside of the pleadings* and WITHOUT ANY TESTIMONY made a decision and judgment contrary to the Federal Constitution. There was no federal question in the case until it was injected into the case by the decision of the Oregon Supreme Court. It was therefore impossible for such question to have been brought before the Supreme Court of Oregon for consideration prior to December 20, 1910, because there was no such question in the case. *Is this Federal Supreme Court then without jurisdiction to consider a violation of the Constitution by the State Supreme Court because the federal question was not raised until after the State Supreme Court brought it into the case?* Or, *can a State Supreme Court deprive this Supreme Court of jurisdiction by not mentioning in its decree the federal question brought into the case by its own opinion and pressed upon the con-*

sideration of the Court by a motion to modify its decree in harmony with the constitutional rights of the plaintiffs in error, and considered by the Justices of the Supreme Court for a whole month before rendering its final unconstitutional decree?

C. B. & Q. R. Co. v. Chicago, 166 U. S., 228, 41 L. ed. 979

Meyer v. Richmond, 172 U. S. 81, L. ed. 43rd, 374 at p. 377

Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208

San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 175, 47 L. ed. 765

In the present case, the federal question was raised on a motion to modify decree of the Supreme Court, after its opinion had been filed, but before it had been certified down. The Court entertained the motion and considered it only for a month before denying it.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed, 1015

The present case is anomalous and hardly comes within any fixed rule of practice. It is improbable that any other State Supreme Court has ever assumed to itself such arbitrary and dictatorial power. "There can be no wrong without a remedy," is a principle as old as our system of jurisprudence, and we submit

that it is just as much a violation of the 14th amendment to deprive a citizen of his remedy as it is to deprive him of his property.

Respectfully submitted,
TURNER OLIVER,
GEORGE E. CHAMBERLAIN, and
WILL R. KING,
Attorneys for Plaintiffs in Error.

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JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1913
No. 463.

HECTOR McDONALD AND MARGARET McDONALD,
Plaintiffs in Error,

vs.

THE OREGON RAILROAD AND NAVIGATION COMPANY,
A CORPORATION,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF OF DEFENDANT IN ERROR.

W. W. COTTON,
ARTHUR C. SPENCER AND
H. W. CLARK,
Counsel for Defendant in Error.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 463.

HECTOR McDONALD, and MARGARET McDONALD,
Plaintiffs in Error.

AGAINST

THE OREGON RAILROAD AND NAVIGATION COMPANY, a corporation,
Defendant in Error.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Now comes the defendant in error, The Oregon Railroad and Navigation Company, by its counsel, and moves to dismiss the writ of error, for lack of jurisdiction of this Court, upon the ground that the decree to review which the said writ of error was taken out, is the decree of the Supreme Court of the State of Oregon, and that the decision by said Supreme Court of Oregon did not draw in question any title, right, privilege or immunity claimed under the Constitution of the United States, or otherwise raise any questions within the jurisdiction of this court under Section 237 of the Judicial Code.

W. W. COTTON,
A. C. SPENCER,
HENRY W. CLARK,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 463.

HECTOR McDONALD, and MARGARET McDONALD, Plaintiffs in Error, AGAINST THE OREGON RAILROAD AND NAVIGATION COMPANY, a corporation, Defendant in Error.	NOTICE OF MOTION.

Please take notice, that upon the transcript of the record herein the defendant in error, The Oregon Railroad and Navigation Company, will submit the foregoing motion to dismiss the writ of error herein, together with the annexed brief of argument thereon, to the Supreme Court of the United States at a stated term thereof on the fourth day of May, 1914, in the City of Washington, District of Columbia, at the opening of court on that day, or as soon thereafter as counsel can be heard.

March 27th, 1914.

W. W. COTTON,
ARTHUR C. SPENCER,
HENRY W. CLARK,
Counsel for Defendant in Error.

To:
Hon. GEORGE E. CHAMBERLAIN,
TURNER OLIVER, Esq.,
Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 463.

HECTOR MCDONALD, and MARGARET MCDONALD,
Plaintiffs in Error,

AGAINST

THE OREGON RAILROAD AND NAVIGATION COMPANY, a corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

Statement of Facts.

This is a motion to dismiss the writ of error, issued on the twentieth day of December, 1912, for the purpose of obtaining a review of the judgment and decree of the Supreme Court of Oregon entered on the fourteenth day of March, 1911 (p. 52) in an action in which the defendant in error, The Oregon Railroad and Navigation Company (hereinafter referred to as the Company) was plaintiff, and the plaintiffs in error

herein, Hector McDonald and Margaret McDonald, were defendants. The motion is based upon lack of jurisdiction of this court by reason of the fact that the decision of said Supreme Court of Oregon did not draw in question any title, right, privilege, or immunity claimed under the Constitution of the United States or otherwise raise any questions within the jurisdiction of this court under Section 237 of the Judicial Code.

In September, 1905, the defendant in error, a railroad corporation operating a line of railroad in the State of Oregon, purchased for use as a right of way for its railroad, a strip of land belonging to the plaintiffs in error for $600.00 and received a deed therefor, conditioned upon the construction of the line of railroad over said land within two years (p. 9). The Company entered into possession of said land and at the expiration of the two-year period the grading over said land had been completed and thereafter and in August, 1908, while rails were being laid, plaintiffs in error reentered and attempted to take possession of the land, claiming a forfeiture under the said condition in the right of way deed. The Company commenced an action in equity in the Circuit Court of the State of Oregon to quiet title to said strip of land and to prevent the trespasses thereon. A temporary restraining order was issued and the Company completed its construction work. About September fifteenth, 1908, trains were in daily operation across said land.

After the interposition of an answer by plaintiffs in error, praying for affirmative relief (p. 10), the action was duly tried without a jury and a judgment entered dismissing the complaint (p. 17). Upon appeal to the Supreme Court of Oregon, the judgment of the lower court was modified and the Company was adjudged to be the owner of the said land or right of way and plaintiff's in error were enjoined from interfering with the use thereof (p. 52). The lower court had taken evidence as to the value of the said land and the Supreme Court, as a condition to the entry of said decree, required the Company to pay into court the sum of $700.00 and costs, to the credit of the plaintiffs in error. Thereupon a petition for a rehearing and modification of said decree was filed (p. 54), and plaintiffs in error presented to the Court an argument in support of said petition for a rehearing, claiming that the court had erred, and referring particularly as a basis of error to the statutes and constitution of the State of Oregon (p. 54). No suggestion was made that any Federal question was involved and the petition for rehearing was overruled without opinion (p. 60).

A writ of error was granted by the Chief Justice of the Supreme Court of Oregon (p. 65). The assignments of error (p. 61) claimed violations of Amendments V, VII and XIV of the Constitution of the United States, and of various sections of the Oregon Constitution.

This Court is without jurisdiction to review the judgment of the Supreme Court of Oregon, since no question was involved conferring jurisdiction under Section 237 of the judicial code.

Without proceeding to analyze the assignments of error herein, it is evident that no Federal question can be raised or is involved, and that the Court is without jurisdiction to review the judgment in this case. The judgment of the Supreme Court of Oregon sought to be reviewed was rendered in an action in which the parties had duly submitted themselves to the jurisdiction of the court. The action involved primarily the construction of a right of way deed and the consideration and settlement of the equities between the parties thereto. The Company had commenced the operation of its trains over the property conveyed by the right of way deed, and in determining the controversy, it was necessary to balance the private interests on the one side, and the public interest, as represented by the Company on the other. The court, upon all the facts, exercised its broad equity powers, and, although the Company had already paid $600.00 for the right of way deed, required it to pay the additional amount of $700.00, and thereupon restrained the plaintiffs in error from interfering with the Company's possession and use of the land in question. No Federal question was involved or presented to the court at any time, and, as a practical matter, plaintiffs' real objection to the decision of the Oregon Court seems to be the failure of the court to award to them $1000.00, the

amount alleged in their answer as the value of the land.

In the argument of counsel on the motion for a rehearing, the claim was made for the first time that the plaintiffs in error had been deprived of their property without due process of law, but even here the reference was obviously to the State Constitution. It is questionable whether the statements in argument of counsel can be taken into consideration in determining a point of this kind. However, even if a Federal question had been specifically raised in the petition for a rehearing, it would have been too late (*Consolidated Turnpike Company* v. *Norfolk Railway*, 228 U. S. 326, 334), and especially so where the petition for a rehearing was dismissed, and no rehearing was in fact held. Under these circumstances the court has not passed directly upon any Constitutional question. It is likewise of no avail for the plaintiffs in error to attempt to raise a Federal question and confer jurisdiction by statements in the assignment of error, or writ of error (*Hulburt* v. *Chicago*, 202 U. S. 275, 280; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217, 226).

The specific assignments of error raise only questions which have been many times passed upon by this Court adversely to the position necessarily taken thereon by plaintiffs in error. Amendments V and VII of the Constitution of the United States regulate only action under Federal authority, and are not applicable to and do not constitute a proper basis for an assign-

ment of error upon the review of a decision of a State court in a suit which concerns only action under State authority (*Twining* v. *New Jersey*, 211 U. S. 78, 93). The Fourteenth Amendment contains the only guaranty of the Federal Constitution that due process of law shall be observed by the States and their agencies. But any claim under the Fourteenth Amendment comes too late to confer jurisdiction upon this Court where, until the assignments or writ of error, the arguments have been based on State statutes and the State Constitution (*Osborne* v. *Clark*, 204 U. S. 565, 569; *Consolidated Turnpike Co.* v. *Norfolk Railway*, *supra*). And in any event a claim of violation of the Fourteenth Amendment cannot be sustained because of irregularities or matters of procedure in the State Courts "where the parties have been fully heard in the regular course of judicial proceedings," (*Central Land Company* v. *Laidley*, 159 U. S. 103; *Iowa Central Railway Co.* v. *Iowa*, 160 U. S. 389, 394); nor for refusal of trial by jury (*Iowa Central Railway Company* v. *Iowa*, *supra*).

Wherefore, the writ of error herein should be dismissed.

W. W. COTTON,
ARTHUR C. SPENCER,
HENRY W. CLARK,
Counsel for the Defendant in Error.

rightfully decide subjects to which judicial power extends. *Castillo* v. *McConnico*, 168 U. S. 674.

Where a defendant in the state court did not object to the jurisdiction of the court to entertain an action to enjoin him from enforcing his rights of ownership, but went further and sought affirmative relief in that action, he cannot be heard in this court to deny that the court had any power to exert the very jurisdiction which he invoked.

Writ of error to review 58 Oregon, 228 dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court involving a railroad right of way, are stated in the opinion.

Mr. W. W. Cotton, *Mr. H. W. Clark* and *Mr. Arthur C. Spencer*, for defendant in error, in support of the motion.

Mr. George E. Chamberlain, *Mr. Will R. King* and *Mr. Turner Oliver*, for plaintiffs in error, in opposition to the motion.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The defendant in error, hereafter referred to as the Railroad Company, was plaintiff below and sued the plaintiffs in error who were defendants to enjoin them from interfering with its right of possession of a strip of land constituting a railroad right of way. It was alleged that this strip which traversed property belonging to the defendants had been bought from them by the Railroad Company for a cash price of $600 which was paid, but nevertheless the defendants, asserting some title to the land, were threatening to disturb the railroad in its possession, to tear up a track where laid, and otherwise to prevent the use of the land for the purpose for which it had been bought. The defendants answered and although

admitting that they had sold the land to the railway for a right of way and had received the stipulated price, nevertheless asserted that they were yet the owners of the property for the following reasons: *a*, Because in the deed by which the property was conveyed there was an express condition "that the Oregon Railroad & Navigation Company will construct the line of road over the above described premises within two years from the date hereof." *b*, Because while after the deed the railroad had commenced to construct its road and had graded along the right of way, after doing so it suspended all work so that the two years provided in the deed elapsed without the railroad being built and therefore all right to the land had been lost and the defendants had reëntered and notified the railroad of the fact.

Averring that the land was "reasonably worth the sum of $1000 and the plaintiff has not paid the same nor any part thereof and has not offered to pay defendant anything for said land since its failure to comply with the condition of the deed," the answer prayed not merely the rejection of the plaintiff's demand and the dissolution of the injunction which had been allowed, but asked substantive relief, that is, that the defendants be decreed to be the owners and that the complainant be enjoined from in any way interfering with them and for the awarding of "such other and further relief as shall seem to the court equitable in the premises." After trial at which considerable testimony was taken among other things as to the value of the property, the court, holding in favor of the defendants, decided that the railroad by virtue of its failure to build within the period specified and the reëntry of the defendants, had lost all right to the land and therefore that the subsequent action of the railroad in entering upon the land to complete its railroad was a trespass. The injunction which was issued at the inception of the cause was dissolved. On appeal the court below expressly